

THE *16*
Faithful Councillor:
OR THE *16*
MARROW
OF THE *16*
LAW in English. *1632 375*

In two Parts.

The first, Methodically and plainly shewing
How any Action may be warrantably had in the
Common Law, for Relief in most Causes of wrongs
done; in which is handled many of the most useful and
most usefull Heads of the Law
now in practice.

The second, by way of Appendix, in what Cases and for what Injuries
Relief is to be had in the High Court of Chancery; wherein is set forth very
much of the Learning touching the Jurisdiction and Manner
of proceedings in that Court.

With an exact Alphabetical Table of the most material things
contained in each Chapter.

A Subject very usefull for all degrees of men, but most delightfull to those
that are studious therein.

By *William Sheppard, Esquire.*

The second Edition.

PROV. 22. 22. *without Content papers are disapproved of but in the printing of them
errors they are abolished.*

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sign of the Gun in Little Britain, and at the Gun and at the Gun in
West and in Fleet, 1632.



ACADEMIÆ CANTABRIGIENSI
JOANNES WORTHINGTON
JOANNIS VIRI CELEBERRIMI FILIUS
M. A. COLLEGII S. PETRI OLIM SOCIUS
IN PERPETUUM OFFICII ET BENEVOLENTIÆ
TESTIMONIUM
D. D. D.



To the Right Honourable, and Reverend Iudges,
the Lords Commissioners of the great Seal of
England, the Lord Chief Iustice of the Vpper
Bench, the Lord Chief Iustice of the Common
Pleas, the Lord Chief Baron of the Exchequer,
and the rest of the Iudges of these Courts.

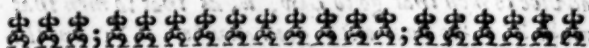
Right Honorable, and Reverend Iudges,



His rude and imperfect piece,
being now to pass into the
Sea of Common opinion,
shall I be so bold as to pre-
sent to your selves, and hum-
bly beg of you (as Ruth did of Boaz) to
cast the skirts of your garment over it, and cover
it from the strife and heat of tongues? You
know it too well; it is Dog-days all the
year with those that act or speak any thing
to the profit of the present State. Oh, they
have a hot time of it, and need more then
ordinary adumbration. If I may be so bold,
there is all the equity in the World you

should overshadow it ; who so fit Patron
for the Child, as the Parents? twas your un-
paralleld industry , and wise care for the
good and ease of the Publick, that anima-
ted and gave it life. O happy change ! and
happy time that yields us such Examples,
Incitements and Incouragements ! Others
Gleanings I confesse are better then my Vin-
tage, and I am the least able of the Tribe ;
yet cannot I sit still , but must once more
adventure to cast in my mite. Accept (noble
Patriots) this little handfull of meal , that
may perhaps encourage others that have
more leifure and ability to present you with
a pair of Turtle Doves or a Lamb. But I
know to whom I speak ; I must not hold
you too long from the Publick that lieth
upon your Shoulders, least I give offence.
Go on Worthies, go on, do good and great
things for that State that wants nothing
but age to make it happy. So may the an-
cient of days give success , and so add to
your days , that you may see it Crowned
with Religion, Peace, and Plenty, the hear-
ty prayers of your Honors, and his Coun-
treys servant,

Will. Sheppard.



To the Reader.

Courteous Reader,



Here's now my last piece, being a Treatise of many of the most usefull Common places of the Common Law; and of the practise of the Court of Chancery, and of the things now most in use, leading to advice for the proper remedy in case of wrong. All men can, and most men do speak too much of the Maladies, and distempers of the times; but give me the man that can, and doth advise and give a remedy. In some cases of injury (though this be rare) there is no remedy; there is *damnum sine remedio*; in some there is a double remedy; in all cases where remedy is given, there is a proper remedy, whereof many missing, they instead of finding help and ease, meet with a cure worse then their disease, and add affliction to their affliction. This work may give some help herein: not that it is universal, or infallible; we intend it not so: many errors and mistakes, some of mine own by want of time and strength; some of the Printers by want of care, thou maist happily find in it. But such as it is, and with all his faults, it may be useful and profitable. To the ignorant, it may be a light, and to the learned a delight. To the Lawyer it may serve for a Table: to the Attorney or his Clyent that will adventure to begin suits

Ad ea quæ frequentius accidunt iura adaptantur.

Unaqueque cogitatio consilio
stabilisur; &
prudentibus
consiliis gere
bellum.
Pro. 20. 18.

Debile fun-
damentum sal-
lit opus.

upon their own heads, it may be of further use. But my
advice to men that go to Law, is, as that to men that
make War, to do it with good advice. A Fee in the
beginning of a suit to a learned Lawyer, is well be-
flowed; a Fee then saved, is ill saved, and oft times
causeth the expence of many Fees afterwards. The be-
ginning is half the whole: lay the foundation sure,
and expect a successful building. If this may any
way conduce to publick ease and profit, I have my
end, let God have the glory, and it shall suffice to
me that thou dost believe I desire to be

Thine, and the Common-
wealths Friend. W.S.

THE



THE Faithful Counsellor.

CHAP. I.

Of Actions in General.



AN Action is nothing else, but the right of prosecuting in Judgement of that which is due to one. Or it is the lawfull demand of ones Right. Or (as others define it,) The form of a suit given by Law to recover a thing. But this is sometimes taken also for the power, or ability a man hath to sue, as at other times it is taken for the execution of this power, The Suit it self; and this is the proper sense of the word. *Cook upon Lit. fol. 284, 285.*

Of Actions, some do concern the Pleas, that were called the Pleas of the Crown, *Placita Corona* or *Criminalia* (of which

What it is.

How many kinds there are.

which we shall not speak at all.) And others do concern Common Pleas, called *Placita communia, seu civilia*. And of these we purpose to Treat. These are either Real, Personal, or Mixt.

The Real Action is such a one, wherein Franck-Tenement, or Inheritance is to be recovered. Or such an Action whereby the Demandant claimeth Title to any Lands or Tenements, Rents or Commons in Fee-simple, Fee-tail, or for Term of life.

And this again is either Possessorie (i.e.) of a mans own Possession; or Ancestral, (i.e.) of the Seise and possession of his Ancestor; And this last is either Droiturel, when nothing doth descend from the Ancestor but a naked right; Or Possessorie (i.e.) when the Ancestor doth die in Possession, and the Land it self doth descend.

The Personal Action, is such an Action as is in the personality onely, whereby a man claimeth Debt, or Goods, or Chattels, or Damages for wrong done to his Person; or when some personal things, as a Debt, or sum of Money, or Damages is to be recovered. And this Personal Action is also either Popular (i.e.) given to any man that will sue, as upon a Statute; wherewith we shall not meddle much in this Treatise. Or it is particular (i.e.) such an Action as is given to one, or some men in certain.

The Mixt Action, is such an Action as wherein not only the thing it self, being a Real thing in Demand, is to be recovered, but also Damages for the wrong, as in Assise, Waste, *Quare impedit*.

We shall not say much to Real, or Mixt Actions, our purpose being especially to speak to Personal Actions; such as are Account, Debt, Trespas, Replevin, Action of the Case, and a Detinue; which is reckoned amongst Personal, and not Mixt Actions; albeit the thing withheld be demanded, and shall be recovered if it may be found, otherwise Damages for it. Cook upon Lit. 284, 285.

Plaintiff.

Defendant.

He that sueth in an Action Real, for Title of Land, is called a Demandant; and he that is sued, is called a Tenant. But

In every Action, and the proceedings thereupon, 3. things are to be done. 1. The cause or matter of Fact must be shewed: and this the Parties must do. 2. The Law must be shewed, and Judgement given according to the Law upon the matter of Fact appearing in the case; and this the Judges must do. 3. The execution of the judgement given by the Judges: and this the Officers of the Court must do. *Plowden. 36.*

Actions being declared by Writs, the instrument by which things in Action are gained, and the way to attain ones end in an Action. These two having so much affinity one with another, that they seem to be confounded, and one of them sometimes to be taken for the other, we shall therefore treat of them together.

CHAP. II.

Of Writs in general, and the several sorts thereof.

A Writ, is a precept in the name of the Keepers of the Liberties, &c. written in Parchment, and Sealed with the great Seal. Wherein there is, 1. The Salutation, 2. The matter, or cause of complaint briefly set down, called *Breve*, *quia rem breviter enunciat*. 3. The Conclusion, wherein are 1. The *Teste*, which in the Chancery is the Keepers of the Liberties themselves; in other Courts the Chief Justice of the Court, as a witness. 2. The place. 3. The time, or the date. These Writs admit of many divisions, and distinctions. Sometimes they come open, and sometimes inclosed in the Seal. And hence perhaps they are said to be open or Patent, and close. But some of them are said to be *Brevia amabilia*, some *Brevia adversaria*, *Amabilia* are Writs of Entry for the passing of a Common Recovery, and a Writ of Covenant for the passing of a Fine. *Adversaria* are all other Writs; which are either Original (*i.e.*) the foundation of the Action, as *Novels*, &c. Mean, (*i.e.*) between the Original and the Judgement, as *Capias*, *Exigent*, &c. Judicial (*i.e.*) tending to the Execution of the judgement given, as *Elegit*, *Fieri facias*, &c.

facias, Levare facias, Habere facias seisinam, or Possessionem, &c. Original Writs have some of them a certain form and rule; others are to be framed according to the case. Original Writs are some of them Real, some Personal, some Mixt. Some of them also are Writs of prevention, or *Anticipation*, as *Warrenia, Chorea, Audita Querela, &c.* which may be had before impleading, or Execution sued; some for Restitution, as *Waste, Trespass, &c.* Some of them are to stay suits in other Courts: some to remove Causes out of, or send them back to, or Reform disorders in other Courts; as *Accedat Curiam, &c.* Some to enable other Courts in an Action: some to be eased of a burthen coming, or come upon a man. But most Writs are to recover some Debt or Duty, or amends, or recompence in lieu thereof. Our purpose is not in this Treatise to meddle with all the Writs of the Common Law, appointed for the relief of grieved men, the which are very many, and of sundry sorts and natures. For some of them are of little or no use at this day: as *Nativo habendo, Libertate probanda, Libertatibus allocandis, Manuscaption, extirpation, passagio, heretico comburendo, quare jura, ad quod idem munificia assensu Capituli, penitus in Assis, occupavit, contra formam collationis, contra formam Feoffamenti, excommunicatione facta, and some such like.* To all which we shall not say any thing at all. Some are for the present of little, and likely in time to come to be of less, or no use; as *Diem clausit extremum, Mandamus, Quare plura, Devenerunt, Melius Inquirendum, Valore maritagi, Etate probanda, Precipe in Capite, Droit de Guard, Ejectment de Guard, or Ejectione Custodia, Ransomment de Guard, Intrusion de Guard, Datus est nobis intelligi, Excommunicato capiendo, and many other such like.*

All these also we shall now pass over with silence. Others there are, whereof there neither is, nor is like to be much use, as *Quare impedit, Assise de darreine presentment, Quare Invenit, Quare non admisit, Droit de Advowson, Inhibition, Indicavit, Sequestro habendo, Ex gravi Querela, vitia removenda, Ne Admittas, Astornato faciendo, Causa Matrimonii prolocuti, Cui ante divorcium, Homine respiciendo,*

plegiando, Domo reparando, Praesumere, Summons ad Auxiliandum, plegis Acquistandi, Rationabili parte bonorum, Monstraverunt, Protection, Effendi quietum de tollono, Estrepmnt; we shall speake nothing to all these.

Others there are which are Writs appointed to be used in Real Actions, as Writs of Right, and of Entry, Assise, Ayle, Besaile, Mordauncester, Nuper obiit, casu consimili, cui in vita, Cofinage, Formedon, Quid ei de forceat, Estheat, Rationabili parte, and such like, very seldom used in these days; we shall also pass over these altogether.

Others there are of more common use; as Accedas ad curiam, Recordare, Certiorari, pone ad Terminum qui praeteriit, Attachement, Attaini, Admesurement de Dower, Admesurement de Pasture, Assise de Sovent foits, Distress, Audita Querela, Capias ad valentiam, Capias ad computandum, Consultation, Certiorari, Contributione facienda, Corpus cum causa, Disceit, Warrantia Charta, Curia claudenda, Decies tantum, Dedimus potestatem, Dover, Distringus, Distress, Error, Dum non sunt compos mentis, Dum fuit infra aetatem, Capias pro fine, Ex parte talis, Executione Iudicii, Extendi facias, Faux Judgement, Habeas Corpus, Habeas Corpora, Indemnitate nominis, Injunction, Iusticies Mesue, Moderata misericordia, Ne iniuste vexes, Ne omittas propter aliquam libertatem, Nisi prius, Parco fraeto, Partitione facienda, per qua servitia, perambulatione facienda, Prohibition, Procedendo, proprietate probanda, Quare e' ecit infra terminum, Quid iuris clamat, Quem redditum reddit, Quod permittat, Quo minus, Quo iure, Quo Warranto, Rationabilis divisio, Recaption, Rescort, Recordare, Repl:vin, Retorno habendo, Scire facias, Second delivrance, Sequatur sub suo periculo, Summons, Secunda Superoneratione, Summons ad Warrantizandum, Superfed:as, Venire facias, Venditioni exponas Withernam, Latitas, and such like. To every one of these we shall say something: others there are of most common use, as Account, Action of the Case, Debt, Annuity, Trespais, Waste, Covenant, Detinue, Ejectione firme, Capias ad respondendum, Capias, Capias ad satisfaciendum, Fieri facias, Ed:git, Exigent, Habeore facias, Seisinam,

Possessionem, Replevin, &c. such like. To these, or some of these we shall speak most of all. And to these we shall subjoyn such Titles as treat of the same kind of learning, and are of the same use, and to the same end, as Distress, and such other things as have so great a reference to, & so much dependance upon Actions, as that we cannot clear the one, without opening of the other, as Contracts, Property, Pledge, Chattels, Imprisonment, Arbitrement, Avowry, Pound, Damnage, Fesant, Execution, and the like. And these we shall lay down in an Alphabetical order, save only where for Coherence sake, and the better understanding of the matter, we shall alter that Method in some places.

CHAP. III.

Who may bring Actions, or not; and against whom, and how.

Who may bring Actions or not, and against whom they may be brought, and how.

Disabilities.

IDiots, Mad-men, and such as be deaf and dumb, or any other man, woman, or childe (except persons disabled by Law) being wronged, may bring the proper Action appointed for remedy in that case; and all, or any of these wronging others, may be sued. And if an Idiot sue or be sued, he must do it in person. An Infant must sue by Prochein amy, and being sued, must defend by Guardian; but some men there are that are disabled to sue, and this disability is either for a time only, or perpetually. And it is also either absolute, or *Secundum quid*, and *quoad* only; as a man Outlawed cannot sue in his own right, but he may sue in anothers right as Executor; a Fem Covert cannot sue but with her husband; an Infant, but by his Prochein amy; there are six manner of men saith *Littleton*, who if they sue, Judgement may be demanded whether they shall be answered; &c. Or there are six kinds of disabilities of the person disabling him to sue, so long as the disability doth continue. *Littleton* Sect. 196. *Cook* upon it. 1. The villain might not have sued his Lord in his own right, but as Executor he might have sued him. 2. A man outlawed in any Action, or upon any Indictment, cannot sue any man in his own right, whilst he doth so continue, and yet a person Outlawed may sue in anothers right;

as;

as Executor, or Administrator to another. So in his own right the person Outlawed may bring a Writ of Error to reverse that Outlawry, or an Attaint, *Littl. Sess. 197. & Co.* upon it. 3. An Alien that was born out of the Ligeance of the King, in a strange countrey, under a strange Prince, could not sue; if he be a subject to a King that is an enemy, he cannot sue in any action; or if he be a subject to a friend, he may not have a Real or Mixt Action. But this impediment might have been by Act of Parliament, or the Kings letters Patents removed; and the party hereby might have been put in a capacity to sue, *Littl. Sess. 198. and Cook* upon it. 4. He that hath a Judgement given against him upon a Writ of *Præmunire facias*, so long as the Judgement is in force, may not sue another, *Littl. Sess. 199. and Cook* upon it. 5. Where a man is entered and professed in any order of Religion, as Monk, Fryer, or the like, so long as he continues so, and is not dearaigned, he is disabled to sue, *Littl. Sess. 200. and Cook* upon it. Chancery. 6. A man Excommunicate, till he is absolved, cannot sue in any Action; and these disabilities hold for Suits in Courts of Equity also. But it seems that any of these disabled persons may sue in *Auter droit*; being Executor or Administrator to another, they may sue so far as is needful to the performance of that Trust. *Dyer, 275. 371. 187. 227. FNB. 39. 26. H. 8. 1. Co. 8. 68. 3. H. 6. 39. 23. 44. Ed. 3. 27. 16. Ed. 44. 21. H. 6. 30. Dyer 77. Co. upon Littl. fol. 124, 125, &c.* So he that is Attainted of Treason or Felony, or a convict Recusant, or abjured the Realm, is disabled to sue for the time he continues in that estate. But in all those cases, the disability being removed, the *Præmunire*, or Attainder being Radoned, or Outlawry reversed, Excommunicate person absolved, &c. the party may sue again as before. 29. *As. 47. 7. H. 4. 39. Cook* upon *Littl. 128, 129.* And in all these cases, the Defendant when he doth first appear, ere he make any delay, Essoin, or otherwise answer, must take exception to the Plaintiffs ability, and shew his disability, and demand Judgement of the Court, and pray that the Writ may abate; for if he make any Answer, the Exception comes too late:

If Husband and Wife deliver goods, he alone must bring a

How husband and wife must sue, or be sued.

Detinue for them, 8. *Ed. 4. 15.* So upon an *Assumpsit* made to her, to pay him money, 27. *H. 8. 24.* So if he have Execution of a Statute made to his Wife, or upon the Execution of it by his wife before the marriage, and after marriage he is outed, he alone must sue for relief, 37. *Aff. pl. 15.* But the wife can in no case sue alone after the marriage, nor can the husband sue alone for any kinde of Trespasse done to her before or after marriage, but they must joyn. So for recovery of her inheritance, & upon an *Ejectione firme*, they must joyn, *Cook 5. 16. 97. Dyr 805. 9. Ed. 4. 52.* And therefore if the wife were beat before or after marriage, they must joyn; but if the husband die, she may sue alone; and if the beating during marriage be such, as thereby he lose her service or company, the husband alone may sue. 20. *H. 7. 5. Adjudge Pasch. 16. Jac. B. R.* But if a Bond, or Bill be made to them two during Coverture, he may, or may not joyn with her. 3. *H. 6. 37.* So if an Account be to be made to her, by one who was her Receiver whilst she was sole, and yet in debt for the Arrears of Account, they must joyn, 16. *Ed. 4. 8. Plind. 418.* And yet it hath been said, that in all Actions wherein nothing but Damages are to be recovered, and the husband alone may release it, he may sue alone, or joyn his wife with him, as where she is beat or slandered; but it is safe to sue in both their names. So where a Reversion is granted to them, and the Lessee breaks a Covenant. Sir John Bretts case, *Pasch. 14. Jac. B. R. 2. H. 4. 7. 38. H. 6. 3. 37. Aff. 11. Co. 5. 18.* So if he have a Lease for life in her right, and he make a Lease for years, and the Lessee do waste, he may bring the Action of the case with, or without his wife. *Germey vers Longer. Pasch. 38. Eliz. B. R.* So if the husband make a Lease of her land, and the Lessee do waste, it is said he may sue with, or without his wife, 3. *H. 6. 53.* But Quere of this; for if so be it be such an Action, as wherein the place wasted is to be recovered, he may recover her inheritance from her. And if the wife have a Rent charge arrear before her marriage, he may with or without his wife sue for it. *Fenners case. Id. 37. & 38. Eliz.* The wife that hath an husband, cannot be sued in any case without him for any thing she hath done; but

but he may in some cases be sued without her, for things done by her; as if goods were delivered to her being sole, now they must both be sued for it, 39. *Ed. 3. 17. Trover* and *Convention* will lie against them both; but take heed how you declare. *Drapers case, M. 7. Jac. B. 3.* So if he do waste in the land he hath in her right, they must both be sued. So if one had sued her for Recusancy on the Statutes, her husband must have been joyned. So if one sue a man for land he hath in right of his wife, they must be joyned, *Cook 5. 75. 52. 11. 62. Cook upon Litt. 13.* If she being sole, make a Bond or *Assumpsit* after Marriage, they must both of them be sued upon it, *Dyer 355.* But if they both during the Cverture make an Obligation, the husband alone may be sued, 43. *Ed. 3. 10.* and if one be possessed of the Wardship of certain land, either in his wives right, or joynly with her, the Writ of Dower shall be brought against the husband alone, *Co. 1. p. 39.* And in all cases where they are both sued, albeit the husband may answer alone, yet the wife shall never be forced to answer without the husband, 34. *H. 6. 29. 40. Ed. 3. 34. 2. R. 3. 15. 41. Ed. 3. 22.* See in waste, c. 56. in *Sess. 2. 3.*

In cases where the Covenantees have, or are to have several interests or estates, there when the Covenant is made to, and with the Covenantees, & *cum quolibet eorum, aut altero eorum*, in this case these words make the Covenant several. As if one by Indenture Demise black acre to A. and white acre to B. and green acre to C. and Covenant with them, and either of them, or Covenant with them, and every of them, that he is lawfull owner of all these Acres; in this case the Covenant is several; but if he Demise to them the three acres together, and Covenant in this manner, the Covenant is joynit and not several. And if A. and B. do Covenant joynly and severally, in this case the Covenant may be joynit or several, and the Covenantors may be sued either the one way or the other, at the election of the Covenantee, *Cook 5. 19. Dyer 338: Brook Conventions 49.* Six Merchants *Conveniant* with the owners of a ship *separatim*, this word makes the Covenant several, *Cook 5. 23.*

If two, three, or more bind themselves in an Obligation thus,

thus, *Obligamus nos*, and say no more, the Obligation is, and shall be taken to be joyn't only, and not severall; but if it be thus, *Obligamus nos & utrumque nostrum*, or *Obligamus nos & unumquemque nostrum*, or *Obligamus nos & quemlibet nostrum*, or *Obligamus nos & alterum nostrum*, in all these cases the Obligation is both joyn't and severall; so as in these cases the Obligee may sue all the Obligors together, or all of them apart at his pleasure; but it seems he may not sue some of them, and spare the rest, but he must sue them altogether, or all apart by severall *Præcipes*, and in this case he may have severall Judgments, and severall Executions against the Obligors, and take all their bodies in Execution; but he shall have satisfaction but once, or from one of them only; for after he hath been satisfied by one, the rest shall be discharged. But in the first case, where the Obligation is joyn't and not severall, the Obligee must sue all the Obligors together; for he cannot sue one alone with effect, without the rest, unless it be in some special cases; as where one of the Obligors alone doth seal the Deed, or where all of them do seal, but one of them is an Infant, a woman Covert, a Monk, or the like, or where one of them is dead; for in these cases one or some of them may be charged without the rest: but otherwise the Plaintiff cannot proceed in his suit against one, or some of them, without the rest, except the Defendant give him advantage, howsoever the suit be well begun; for when one or some of them alone is, or are sued, it shall not be intended that the rest are living, until it shewed by the other party; yet the Defendant is not bound to answer, unless the rest be sued also; and therefore in this case, he or they, that is, or are sued alone, are thus to take advantage of it, *viz.* to shew the matter to the Court, and to plead in abatement of the Writ; for if he appear and shew it not, but plead *non est factum*, or the like to the Obligation, the Jury must finde against him, and he will be charged with the whole Debt; and so also if one appear, and the other make default, and is Outlawed, it seems he that doth appear must answer all. *Hy. 19. Eliz. B. R.* Adjudge.

If a Bond or promise be made by two or more, not one or any of them may be sued without the rest whilst they live,

M. 7. Jac. B. R. Cook 9. 53. And if a promise be made to two or more, no one of them can sue whilst the rest live, but they must sue altogether.

If an erroneous Judgment be against many, regularly, they must all joyn in a Writ of Error or Attaint, *Cook 5. 25. 11. 43.* And if there be many Executors, and some accept, and some refuse, if they bring any action, they must be all named in the Writ: and yet if one Executor have goods in his possession, and he alone sell them, perhaps for this Contract he may bring an action for the money in his own name: so also if the goods be taken out of his possession alone, it is said he alone may sue for them; but the safest way in these cases, is to sue in the names of all the Executors; for the possession of one of them, is said to be the possession of all of them. If many do commit a Trespass to me, I may sue all, some, or any one of them at my choice; and the recovery against one, will discharge and bar me against all the rest. But of this Question see more in Trespass and other Titles. See more *cap. 7. cap. 55. cap. 42. Sect. 4. cap. 36. Sect. 2.*

CHAP. IV.

In what case the Plaintiff hath his choice to bring one Action, or another, or not.

IF the Sheriff have one in Execution for my Debt, and suffer him to escape, I may (for my relief herein) have an Action of Debt, or an Action upon the Case. So if I sell my goods to one upon an Executory contract for money, I may have either of these Actions for the money. *Cook 4. 92.*

If an Officer take Toll of me, who ought to go quit of Toll, I may have a general Action of Trespass, or an Action of the Case against him at my choice. So if one Distrain my goods that are not Distrainable by Law, I may have either of these Actions against him. *Cook 4. 94.*

If one Distrain me or my Tenants to come to his Leet, who have a Leet my self in the place, I may bring an Action of Trespass, or Trespass on the Case against him. *Cook 4. 94.*

C

And

And albeit it be in such a case wherein I may have an Action for my relief in the disturbance, yet I may have an Action of the Case also at my choice. *Cook 9.51.*

If I be Executor of a Lessee for years, and be Ousted by the Lessor himself, I may have for my relief herein an Action of the Case, *Ejectione firmæ*, or an Action of Trespais at my choice. *Cook 4.85.*

If one contract with me for good consideration, to deliver to me twenty bushels of Corn a year, every year during my life, and he fail to perform with me one year, for this I may have an Action of the Case, but no Action of Debt will lie upon this Contract till all the days be past (that is) till my death; after which my Executor or Administrator may have an Action of Debt. *Cook 4.94.* So likewise if a sum of money be given in marriage to be paid at several days, no Action of Debt will lie until all the days be past, but an Action of the Case will lie upon every failure. *Cook 4.94.*

If one finde my goods, or I deliver them to him, and he having them in his Custody, convert them, I may at my choice have an Action of Detinue, or an Action of the Case upon the Trover and Conversion. *Dyer 121.122.* If I deliver to one money open (not in a bag or box sealed) to keep to my use, in this case for my relief, I may have an Action of Debt, or account, but not an Action of Detinue. *Dyer 22.* If I be a Brewer, and buy Corn of a man to serve my turn, to be delivered me at such a time and place, and he fail me, whereby I am forced to buy elsewhere, in this case I may have an Action of Debt, or an Action of the Case at my choice, but not an Action of Detinue. *Dyer 22.*

Master and
Servant.

If a Servant buy goods for his Master, and give a note of the receipt of them to his Masters use, and undertake by his note to pay the money at a day, but this note is not Sealed; in this case an Action of Debt doth not, but an Action of the Case doth lie against the servant. *Dyer 230.*

If I (being a Solicitor) retained for L. S. do retain an Attorney for him to sue, and I do assume to pay him his Fees, in this case he may have an Action of Debt, or an Action of the Case against me (at his choice) for his Fees. *Adjudge*

LaA

Hill.

Hill. 16. Jac. Bradfords Case, 33. H. 6, 8. 17. Ed. 4. 5. But if I retain the Attorney for *I. S.* and say no more, in this case (it seems) he can have neither of these Actions against me. And yet if I say to him, Be Attorney for *I. S.* and if he pay you not, I will; in this case he hath an Action of the Case only: And if I say, Be his Attorney, and I will pay you, &c. in this case I may be charged in both these Actions at his pleasure. 43. *Eliz. Simpsons Case.*

If one grant me a Rent out of his Land, with a clause of Distress, I may Distrain, or bring an Annuity at my choice; but if the Grant be not for him and his Heirs, I may not have an Annuity against his Heir. *Dyer 344.*

If one have a Judgement for a Debt in any Court of Record, whilst this is in force, the Plaintiff cannot have a new Action upon the first cause; but he must sue Execution upon the Judgement; for which he may have a *Fieri facias, cap. ad Sat. or Elegit*, at his choice. Or he may Outlaw him after Judgement if he please; or the Plaintiff may bring a new Action of Debt upon the Judgement. *Cook 6. 45. 5. 88.*

And albeit the Record be removed out of one Court into another, yet within the year the Plaintiff may take out his execution at his pleasure. If one have a Judgement to Recover an Annuity, he hath no remedy for the recovery of this but by suing out a *Scire facias* on this Judgement. *Cook 6. 45.*

CHAP. V.

Within what time Actions must be brought.

ALL Actions of Trespass *Quare clausum fregit*, Actions of Trespass, Action *Sut Trover*, Detinue and Replevin for taking away Goods and Cattel, All actions of account, other then accounts which concern the trade of Merchandise between Merchant & Merchant, their Factors and Servants: all actions of Debt grounded upon any lending or Contract without especiality, and for arrearages of Rents; all actions of the Case, other then for Slander, which shall be sued, must be commenced and sued within six years after the cause of

such action or suit accrued, if the Plaintiff be then of full age, Discover, *Compens mentis*, at liberty, out of prison, and in England; otherwise within that time after he become so, and not after.

All actions of Trespas for Assault, Menace, Batterie, Wounding and Imprisonment, within four yeers after the cause, and not after.

All actions of the Case for words, within two yeers next after the words spoken, and not after.

But if in a former action, a Judgement being given, or arrested, or the defendant Outlawed, and the Outlawry reversed, a new action may be brought within a year of the Reversal, or arrest of Judgement, or Outlawry. 21. Jac. 16.

All Actions, Bills, Informations which shall be brought for any Forfeiture upon a Penal Law, then made or to be made, whereby the Forfeiture was given to the King only, was to be brought within two yeers after the offence done, and not afterwards.

And all others, except the Statutes of Tillage, which gave the benefit to the King and Prosecutor, were to be brought by the Prosecutor within a year after the offence done, and in his default, and for the King, within two yeers, and not after.

And where by any Statute it is appointed to be brought in shorter time, there it must be brought in shorter time, Stat. 31. Eliz. 5.

CHAP. VI.

where and in what place Actions shall be brought.

ALL Real & Mixt actions, as *Waste*, *Ejectiome firme*, &c. must be brought in the County where the Land lieth, and cannot be laid in any other place, for they are local. So all actions of Trespas; for Trespas which are local (as *Quare clausum fregit*) must be brought in the County where the Land lieth, and the same place must be set down in the Declaration wherein the wrong was done. But (by the Common Law) all personal actions (that are not local in their own nature, as *Quare clausum fregit* is) and briefly, all transitory

itory actions may be brought in any County where the Plaintiff pleaseth. And the Plaintiff by his Declaration may suppose it to be done in any place or County; and so was it held by Justice *Dodrige*. *Hilk. 16. Jac. B. Regis*. But by the Statute of 6. R. 1. cap. 2. The Title whereof is this [*Writs of Debt, Account, &c. shall be Commenced in the Countie where the Contracts were made.*] And the Act it self is thus, [*To the intent that Writs of Debt and Account, and all other such Actions, be from henceforth taken in their Counties, and directed to the Sheriffs of the Counties, where the Contracts of the same Actions did rise: It is Ordained that if from henceforth in Pleas upon the same Writs it be declared, That the Contract thereof was made in another Countie then is contained in the Original Writ; that then incontinently the same Writ shall be utterly abated.*]

The Defendant in Debt upon a Bond, pleads this Statute of 6. R. 1. and that the Bond was not made in L. as in the Writ is alledged, and prays that the Plaintiff being present in Court, may be examined upon it; who thereupon was examined in Court upon his Oath, who confessed upon his Oath that it was made at H. in the County of C. Whereupon it was adjudged, That the Plaintiff should take nothing by his Writ, &c. 9. H. 5. R. 109. *Old book of Entries*, 133. *Crampe. Jur. Courts*, 101. *B.F.N.B.* 116. Yet nevertheless the Law is held to be, and the practise is at this day, That one may lay a Transitory Action, as Debt, Detinue, Annuity, or Account, &c. in what place he pleaseth, and so the Plaintiff useth to do. And accordingly it was held by Justice *Dodridge*. *Hilk. 16. Jac. B.R.* For (said he) *the Statute was never put in ure*. And so is it held in *Cook upon Littleron*, 282. *a. Perk. Grant*, 30. *Brook* cap. 451. *Kitch.* 180. 136. That in an Action brought for Transitory things, as beating a man, or the like, the wrong being done in one Town, the Plaintiff may alledge it to be not only in another Town, but also in another County; and the Jury upon *not guilty* pleaded, are bound to finde for the Plaintiff. And in these cases if the Plaintiff lay the thing to be done in another place, the Defendant may not traverse it, and say it was done in another

place, and not the place set down in the Declaration, unless there be special cause of Justification, which doth extend to the place; as if a Constable of a Town in another County arrest a man for the breaking of the Peace, &c the Action be laid in another County, there he may traverse the County; but withall he must add, *And all other places, saving the Town whereof he is Constable.* So for taking of goods, damage fasant in another County. *Coo. upon Lit.* 283, 282. But if an Action be brought against an officer, for any thing done about his office, it must be laid in the county where the fact was committed, or upon trial it will go against the Plaintiff. 21. *Jac.* 12.

The like is the Law upon an Action brought against a man for doing any thing under any Ordinance of Parliament. *Ord.* 2. *Decemb.* 1646.

CHAP. VII.

Where the Plaintiff may joyn several wrongs in one Action, or where Plaintiffs and Defendants may joyn, or be joyned in Action, or not.

IN Personal Actions, one may comprehend several causes or wrongs in one Action or Writ, so as they be of one nature, and against one person; As Debt and Detinue may be joyned together. And one may bring one Action of Trespass for divers several Trespases done in divers places, and at divers times.

So for divers Trespases one after another in the same place, the Plaintiff may have relief by one Writ with a *Contingendo* (that is) that divers times continuing from such a time to such a time, he did Trespass him. *Cook upon Littl.* 257. *F.N.B.* 91. And yet it hath been said, That this cannot be, except the Plaintiff make a regress after his first Entry. *Baron Henden at Gloucester Assizes.* 17. *Carol.*

So one Action of the Case may be brought for divers *Assumpsits*. And so may one Action of Waste be brought for divers Wastes, done upon divers Lands, granted by divers Leases. But if the causes and wrongs be of divers natures, as Debt and Trespass, or the like, albeit they be against one person,

person, yet they cannot be joynd together in one Action;
Cook 8.87.3. *H.* 4.13.11. *H.* 6.18.

So likewise in Real Actions, which are founded upon a wrong, or deforcement, and do not comprehend any Title in them, there the demandant may demand in one Writ or Action, divers Lands and Tenements which came to him by divers Titles. As where divers Mannors descend to me from divers Ancestors, and I am disseised, or deforced of them, I may have one Writ of Right, or Entry in the nature of an Assise, or an Assise, and comprehend all these Rights in the same Writ. But if I bring a Writ of Entry *Sur Disseisin*, made to my Mother and my Aunt, Copartners in Fee-simple, the Writ shal abate, because the Title is by several Ancestors, *Coo.* 8.87.

The Plaintiff brought an Action of Debt for 3*l.* 18*s.* against the Defendant and his wife, and Declared for 39*s.* upon a Contract of the wives *Dum sola fuit*; and 39*s.* upon an *in simul comput averiunt* with the husband only, and after issue, *Nil debet* found for the Plaintiff, Judgement was said for Error. *Hobbar*d 258.

So if the Defendant be by one Writ sued for one thing as Executor, by reason of the buying of the Testator, and for other things of his own buying, and declare, That upon an Account the Executor being found in Debt to him these sums, promised him payment; this is not good in one Action; for the Defendant is to be charged in two manners, *Hobbar*d f. 20. pl. 115. And yet in *Hobbar*d's Rep. fol. 8. An Action of the Case was brought for slander about a murder, and a conspiracy to take away his life for it in one Writ; and in a Writ of Error brought, wherein divers others exceptions were moved, no exception was taken to this; it seems therefore to be good.

Two, or more Plaintiffs may not sue in one Action for several causes, though of the same kinde; and therefore two cannot joyn in one Writ to sue upon two Bonds for Debt due to them, or so sue one man for Trespasses: but if two or more have cause to have one Action, as if one Bond or *Assumpsit* be made to two or more, in this case they may and must sue all together. And if two men have more Lands and Goods together

gether in joyn^t tenancy, and thereby wronged in it, regularly they must sue joyn^tly in one Action for it. And if they be Tenants in Common of Lands in a personal Action, as for a Trespass or the like wrong, they must sue joyn^tly: but in a real Action they must sue apart. *Coo. upon Litt.* 195. 196. 198.

Nor can one man sue several Defendants in one Writ, in Actions of the same nature, as for several Trespasses: But if one Trespass be done by divers, the Plaintiff may make it joyn^t or severall, as he pleases. *Coo. upon Litt.* 231. 232. And yet two that joyn in a Trespass, do so make one Trespasser, that one of them is answerable for his fellow; and if they be sued in one Action, they may sever in Pleas and Issues; yet one Jury must Assess Damages for all, and there shall be but one satisfaction; and a release to one, will discharge them all; and as to the Damages, he that is no party to the Issue shall have an Acount as well as his fellows: and if they be sued in several Actions, though the Plaintiff may make choice of the best Damages, yet if he take one satisfaction, he can take no more; and if he go about to take satisfaction twice, an *Audita Querela* lieth, *Hob. Rep.* 91. See before c. 3.

CHAP. VIII.

Of an Account.

Scct. I.
What it is.

IT is a Writ lying where a Bailiff of a Lord, Receiver, Guardian, or other hath received money, or other things of me, or of another for me, for which he ought to render an account, and he doth refuse to do it; by this means he may be compelled to account, and I may recover, not only mine own, but Damages also if there be cause. *Cook upon Litt.* 172. *F.N.B.* 116.

Bailiff, what.

By Bailiff here we understand a servant that hath the Administration or charge of Lands, Goods or Chattels, to make the best benefit for the Owner.

And against him this Action doth lie, which he hath or might have made by his industry, his reasonable charges allowed. *Cook upon Litt.* 171. *Cook* 4. 30.

By

By Receiver here we understand him that receive:h money Receiver, or other things, to the use of another to render an account, what.
Cook upon *Lit.* 171.

IN this Action the Plaintiff must take great care that he charge the Defendant aright. For he must be charged (except it be in case of the *Keepers of the Liberties*) as Bailiff, Receiver, or Guardian; for other wise as Apprentice, Surveyor, Comptroller, Reeve or Hayward, he cannot be charged; and therein he must be charged as he is. For if he be a Bayliff, the Writ must charge him as Bayliff; if a Receiver, the Writ must say so: It both, the Writ or Action must so charge him. *Cook* upon *Lit.* 172. When the things of which a man doth receive the profits (whether it be Lands, or Goods) be incertain, as a Mannor, Hundred, or the like, that may be improved, there he shall be charged as Bailiff; but where the things (be it profits of Courts, Forfeitures, Issues, Fines, or Amerciaments) be certain, there he shall be charged as Receiver. 9. *Ed.* 4. 40. Sect. 2. How the accountant shall be charged. For the manner.

If an Heir do sue his Guardian in Socage, for the Profits of his Lands taken before his age of 14. years, he must charge him as Guardian; but if he sue him for any of the Profits after his age of 14. years, there he must charge him as Bailiff. And if he sue a stranger that doth intermeddle with his Land, he must charge him as Guardian. *Littl. Sect.* 124. *F. N. B.* 118.

If I deliver another Wares to sell, and he sell them to divers persons, and receive the money; in this case it seems he is to be charged as Bailiff, not as Receiver. 4. *H. 6.* 27. *Brook Account.* 18. 53.

Where a Bailiff doth make a Deputy, yet the Writ must be against the Bailiff himself. *F. N. B.* 119. *B.* For the matter.

The Bailiff shall be charged for the Profits which he hath, or might by his industry and care have reasonably made and raised, his reasonable charges and expences deducted. *Cook* upon *Lit.* 172.

Sect. 3.
The method
and proceed-
ing in this
Action.

IN the suit upon this Writ, if the Defendant cannot avoid it by Plea, Judgment is first given that the Defendant must account; and thereupon Auditors are appointed and assigned by the Court, to hear and examine the accounts of the party, what he hath received, and what he hath laid out, and that being done, to present it to the Court. And thereupon there is another Judgment entered, that the Plaintiff shall recover this money of the Defendant.

Ex parte talis,
what it is.

And if the Accomptant be found in arrearages before the Auditors, they may award him to prison till agreement made with the party. And in this account they must allow him his reasonable allowances and expences: and if the Auditors refuse so to do, or charge him with more then he hath received, then (for his relief) his next friend may have a Writ out of the Chancery, called *Ex parte talis*, which is directed to the Sheriff to bring his body into the Exchequer before the Barons there, with four Mainpernors, there to account before them at a certain day, and to warn the Lord to appear at that day; or if the Plaintiff please, he may waive this course, and bring a new Action of Debt for the arrearages found upon the account, or he may keep him in Prison upon their Commitment, till he have paid or agreed: but if when the Defendant doth first appear, he deny he is his Bailiff, or Receiver, then his Issue must first be tryed, and if it be found against the Defendant, the Judgement is *Quod computet*: and if after that he will not appear, a *Scire facias* is to be had; and if he come not, a *Capias ad computandum*, and upon that an *Exigent*. And if the Defendant appear not upon the first Writ, the Plaintiff may have a *Capias*, and *Proces* of Outlawry, or he may have a *Monstravit*; which is an old Writ (now out of use) and doth lie where the Bailiff or Receiver hath no Lands whereby to be distrained, and doth lie hid; then this Writ was granted to take his body; and this was used before any *Proces* of Outlawry was given in the Case; but after the first Judgement, a *Capias ad computandum* only lieth, *Stat. 13. Ed. 1. cap. 11. F. N. B. 117. Plow. 393. Cook 11. 40. Stat. 5 2. H. 3. 24.*

*Capias ad com-
putandum,*
Where it
lieth,
Monstravit,
What it is.

The

THE Ward may have this Writ against his Guardian in Sockage. *Lit. 1. 24. F.N.B. 118.* The Executor or Administrator, upon accounts to be made to the Testator. *Stat. 1. 3. Ed. 1. cap. 23. Dyer 23. Kelm. 1. 31.* The succeeding against the preceding Churchwardens. *8. Ed. 4. 6. Broo. Account 71.* but the Parishioners cannot bring it against the Churchwardens.

Sec. 4.
Who may
have this
Writ or not.

One Merchant may have it against another Merchant where they occupie their Merchandizes, and Trade together. *F.N.B. 117.* Also one Joynt-Tenant, or Tenant in Common, in case where he doth make his companion his Bailiff of his part, may have this Action against him: but if one Joynt-Tenant, or Tenant of goods in Common, deliver them to a stranger, he alone must have the Action. *Cook 11. 89. F.N.B. 118.*

If a stranger take the Profits of my wives Land during marriage, and I die; my Executor, and not my wife, shall have this Action for the Profits. *F.N.B. 119.*

If I deliver one money to keep till after my death, and then to dispose for my soul, my Executor cannot recover it by this Action; for as to this money, he is my Executor.

IT lieth (as before) against a Guardian, Joynt-Tenant, Tenant in Common, Merchant: but it doth not lie against a Joynt-tenant, or Tenant in Common by his companion, unless he be made Bailiff for the Profits, &c. *Cook upon Lit. 1. 272.*

Sec. 5.
Against
whom this
Action may
be brought or
not.
Joynt-Tenant
Tenant in
Common.
Baron & feme.

It lieth against a man or woman Guardian, Bailiff, or Receiver. *Cook 11. 89. F.N.B. 119.*

It lieth against the husband for the receipt of his wife; against the wife and husband for the receipt of the wife whilst she was sole: but it lieth not against a wife without her husband. *4. Ed. 4. 25. Broo. Account. 68. 82. Dyer 202. 28.* It lieth against a body Politick, as against any man. *19. H. 6. 5.* It doth lie against a servant that hath a command to Receive for his Master. *19. H. 6. 5.* It lieth against the Keeper of a Park that hath the charge of the Deer, as Bailiff of his Park. *10. H. 7. 6.* Also it lieth against an Executor or Administrator, or any other that medleth with the Lands of the

Executor.

Infant.

King in his case; but in the case of a Common person it doth not lie against an Executor or Administrator. *Lit.* 28. *Cook* 11. 84. 90. Nor doth this Action lie against an Infant, as Bailiff or Receiver. *Lit.* 28. *Cook* upon it 172. Nor against a Disseisor for the profits of the Land, *Cook* 11. 89. upon *Lit.* 72. Nor against a Parish-Priest for offerings, without some agreement. *F.N.B.* 119. Nor against a Surveyor, Apprentice, Comptroller, Reeve, or Hayward, unless he can be charged as Bailiff, or Receiver.

Sect. 6.
Where and in
what case the
Action lieth
or not, but
some other
Action, or
none at all
against a
Guardian.

THe Heir may have this Action against his Guardian in Socage, to compel him to render the Profits of the Land to him: but he cannot sue him till he be fourteen years old. And if a stranger that is not a Prochein Amy enter upon the Lands of such an Heir before his age of fourteen years, as Guardian to him; in this case he may sue him also, and charge him as Guardian in Socage: and in this case it seems he may sue him before he is fourteen years old; but if a stranger enter upon an Infants Land without any such pretence, the Infant is to be relieved by an Action of Trespass; and not by this Action. *Lit.* Sect. 124. *Cook* upon it, 89. *F.N.B.* 118. *Dyer* 130. 21. *Doff. & St.* 13.

Against a
Bailiff.

If a man will enter upon my land upon any pretence to my use, and take the profits of it as for me, I may have this Writ, and charge him to account for it. So if a man will take up my rents as my Bailiff, being so appointed by me, I may have this Writ, and charge him to account for them: but if one enter so upon my land, before I enter into it, and have the Possession of it, in this case it seems this Writ will not lie. *Cook* upon *Lit.* 89. 90. *Dyer* 277.

If a Tenant by *Elegit* of my land, do make waste upon the land, and have received more then his due money, I may call him to an account by this Writ. 12. *E. 4.* 30. And if there be two Joynt-tenants, or Tenants in Common of Land, and the one of them doth make the other his Bailiff of his Moyetic, and he will not answer him the profits, he may by this Writ compell him to it. *Cook* upon *Lit.* 172. *F.N.B.* 118.

If I deliver to another Money, Corn, or Wares to account Against a Receiver, or to imploy to any purpose, as to pay over, to bestow, or the Wares to give to the poor; or on condition, that if he do such a thing he shall have it, otherwise that he shall redeliver it; in all these cases untill the thing be done, the property is in me, and I may countermand it: and if it be not done, and the thing not restored to me, I may recover it by this Action. *Dyer* 21.57. *Plowden* 92. *F.N.B.* 118. But in the case of Money, if it be in a bag sealed, or box locked, the proper remedy is by Detinue. *Brook Account* 53. If one receive Money of another to my use, or to pay over to me, and he do not pay it to me, I may have this Action against him, and so may he that delivered the money to him. *Dyer*. 22.57, 18. *Ed.* 4.23.

If a Sheriff levy money on a *Fieri facias* for me, and do not Sheriff pay it to me, I have this Action to recover it. 13. *H.* 7.1. & *curia in Co. Banco*. If I make a Bill under my hand and seal, that I have received 20*l.* of *I.S.* to bestow on Wares, and I do not bestow it accordingly, in this case whilest I live, he Election may have this Action, or an Action of Debt against me at his choice; but after my Death he hath no remedy against my Executors but by Action of Debt, *Dyer* 20.21. If I deliver to another Goods or Money beyond Sea, to be delivered to Debt. me here again in *England* at a certain place, and he deliver it not, I may be relieved by this Action, *F.N.B.* 118.9. If one Executors, Devise that his Executors shall sell his land, and out of the Profits thereof shall give such a sum to me, in this case and such like, where the money is to issue out of the land, I may have remedy by this Writ, and I need not sue for it as for a Legacy. *Dyer* 151. & *per* three Justices.

If the Mortgagee after the payment of the money by the Mortgager deliver him the money again, the Mortgagee may recover it by this Action. *Adjudge Mich.* 4. *Eliz.* If one take upon him to receive my Rents, without my agreement, and do not pay them to me, I may recover them by this Action. 4 *H.* 7.6. *Brook Account* 65.

If one deliver goods to deliver to me an Infant at my full age, in this case when I am of age I may recover them of him

Election.
Detinue.

Prerogative.

Privy.

in this Action, or a Detinue, at my choice. *Fitz. Detinue*, 53.

If two joynt Merchants occupy their Stocks, Goods, and Merchandizes in common, to their common profit, one of them may have this Writ against the other: but then they must be both of them named Merchants in the Writ. *Cook super Lit.* 172. And a man could not have toucht the Kings Lands, or medled wih his Goods, but he was liable to be questioned by this remedy, and to be called to an account in the Exchequer, though not by this Writ. *Cook* 11. 91. But this Action of account lieth not in these following cases. First, Where the party to be sued claimeth the thing to his own use. Secondly, where there is no privy between the parties, neither *ex provisione legis*, called *Privy in Law*, as in the case of a Guardian, nor in Deed, by the consent of the party; as when Goods are delivered to a stranger, and not to my use, or to be delivered over to me, there is no agreement between the parties; but in the Kings Case, the Law will supply a privy. Thirdly, when he that delivereth the things, hath taken an Obligation for security of the things delivered. Fourthly, where the party that hath the things, hath onely a bare oversight of them, as a Bailiff of a Plow, Shepherd of Sheep, or the like. *Cook* 11. 93. *Dyer* 114. *Dyer* 20. 277. *Brow. account* 81. 29. *Coo. upon Lit.* 272.

If one by wrong enter into my land, and take the profits thereof, I cannot bring this Action against him. *Cook upon Litt.* 172.

So if I be a Parson, and a stranger take away my Tythes after severance, I may not have this Action against him, but some other for lack of privy; by the better opinion. *M.* 14. *Q. Com. B.*

So if a Term of years be Devised to another for life, the Remainder to *I. S.* and the first Devisee is Executor, and he enter and make his Executor, and die, and he enter and take the profits; in this case *I. S.* cannot bring this Action for his relief. *Dyer* 277.

If a man give me goods by his Will, and his Executor will not deliver them, I cannot recover them by this Action. *Cook* 11. 89.

So neither if Goods of the Testator be kept from an Executor, he cannot recover them by this Action. *Cook* 11.89. And if I deliver another, any live or dead Goods to his own use, or to any such purpose, it seems I may not have this Action; but if he keep it, or take it away, I may have an Action of Detinue; and if he harm it, an Action of the Case: but if they be delivered to be sold, and the most be made of them, there this Action lieth. *Dyer* 120.22.6. *Ed.* 4.1. *F.N.B.* 118. B.

If a man deliver ten pound to Merchandize, no account Action of the doth lie for the ten pound, for this is certain; but for the Case. profits thereof, which is uncertain, it doth lie. So it doth not lie for the arrears of a Lease for years, or at will, because it is certain; for uncertain things lie only in account. *Brook Account* 81.8. *H.* 5.3.

The Auditors are such as are appointed by the Court to hear and examine the Accounts of a Bailiff or Receiver, that is sued upon this Writ in the same Court; and these are either upon the Statute of *Westm.* 2. cap. 11. and then they are Judges of Record; but then there must be two at the least; or one may be an Auditor at the Common Law; and when there is but one, he is such an Auditor. *Cook* 10.103.2. *H.* 6.41 10. *H.* 6.24.

Such as are Auditors within the Statute, may commit the Accountant to prison if he be found in arrearages, and do not pay it; but then they must do it presently, and cannot do it afterward; but if the Lord be in arrear to his Bailiff they cannot commit him to prison: for he doth remain still at the Common Law; yet if the Lord be found in Debt to his Bailiff, or one be in Debt to his Receiver, they shall have their remedy against them, or their Executors after their death. *C.* 10.103.27. *H.* 6.8. 10. *H.* 6.24.25. *Plow.* 17.

A Bailiff shall have allowances upon his account, but a Receiver shall have none. If therefore the Bailiff disburse any thing for his Master belonging to his Office, as pay his quit Rent, or the like, or if he be robbed, or suffer loss by other means without any default in him, it shall be allowed him up-
 Sect. 7. Allowances, and what shall be granted to an Accountant, or not.

on his account: but if he pay his Masters debts, or lay out any thing else not appertaining to his Office, this will not be allowed him. *Cook* upon *Littleton*, 172. 14. *H.* 7. 14. *Plowden* 14.

A Guardian also shall have an allowance as a Bailiff shall have, but not a Receiver, and therefore he is not bound to Trade with the money received. *Brooks Account* 66.

Sec't. 8.
Pleas in Ac-
count, and
what may be
pleaded, or
not.

Some Pleas are in bar of the account, and some in discharge before Auditors. And some Pleas will be allowed before Auditors that will not be allowed in bar of the account. As to the account, the Defendant may plead *Ne unques son Receiver ou Bailiff pur Account Render*, or that he was sued for the same cause, and adjudged to Account, and error brought upon the first Judgement in another Court, where it is depending, and the like. *Dyer* 21 *Cook* 11. 8. 9. *Ed.* 4. 50. And as to his discharge before Auditors, he may plead (if he be not a Receiver) he was robbed, or his disbursements, or that he hath fully accounted with the Plaintiff himself, or the like. *Cook* 4. 84. 5. *Ed.* 4. 5. And if a new Action of Debt be brought for the arrearages found against the Bailiff or Receiver (as it may) the Defendant may plead *Nil debet*, or wage his Law. *Cook* 6. 53. *Stat.* 5. *H.* 4. cap. 8.

Sec't. 9.
The Judge-
ments in an
Account.

THere are two Judgements upon this Writ; the first is, *Quod computet*, which is interlocutory: the last is, *Quod querens recuperet versus defendentem*, so much as he is found in arrearages, & *damna occasione interplacitationis*.

The first is to account only, and upon this the Defendant may be Outlawed. And then before Outlawry, if he appear and enter into account, and be found in arrearages, the Plaintiff shall have a definitive Judgement for the arrearages; and after the first Judgement, no abatement can be for any cause, but a Discontinuance, or *Non suit* may be.

The first Judgement is but an award of the Court, like to a writ to enquire of Damages, and not like to a final Judgement; for there the Action is clearly determined; and these two Judgements depend one upon another; for if Judgement

ment be to Account, and the Plaintiff die before he hath accounted, the Executor cannot go on in that suit, but he must begin again; and no writ of Error will lie upon the first, till after the second Judgement. *Coo. 11. 40. Br. Account, 39-33.*

CHAP. IX.

Of Writs to remove Records, or Suits from, or send them back to other Courts; as Habeas Corpus, Corpus cum causa, Recordare, Accedas ad Curiam, Certiorari, Pone, Procedendo.

VVE have observed before in the division of Writs, that some of them serve to remove Suits out of, or send them back again into other Courts; Of this sort are *Habeas Corpus, Corpus cum causa, Recordare, Accedas ad curiam, Certiorari, Pone, and Procedendo*; we shall only shew you what these Writs are, and then proceed.

A *Habeas Corpus* is a Writ, the which a man Indicted of any Trespass before Justices of the Peace, or in a Court of any Franchise, and upon his apprehension being laid in prison for the same, may have out of the Kings Bench, thereby to remove himself thither at his own cost, and to answer the cause there.

Sect. 1.
Habeas Corpus,
what it is.

And the Order in this case is, first to get a *Certiorari* out of the Chancery, directed to the said Justices for the removing of the Indictment into the Upper Bench, and upon that to procure this Writ to the Sheriff, to cause the body to be brought at a day. *F.N.B. 250. H.* It is also used in other cases for the removing of causes and prisoners out of one Court and Prison into another. *Crompt. Jur. 46. 78. 110. Dyer 152.* The Court of Common Place do use by this Writ to send for prisoners and causes, or causes alone, from Inferior Courts and prisons; as from the Courts of *London, Cinque-Ports, Marches, Stanneries, or any Corporation, or Franchise*; and the Upper Bench do use by this Writ to send for prisoners committed by the Court of Common Pleas, or any inferior Court; and to know the cause of their imprisonment, and if the cause upon Examination be found sufficient, the Pri-

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soner

isoner is sometimes sent back again, otherwise he is discharged. And the Upper Bench is the supreme common Law-Court, and hath power to redress the Errors of others Courts. *Cook* 11. 98. *Dyer* 60. 61.

By this Writ, men in Prison in the Country remove themselves into the Fleet, if there be a Suit against them in the Common Place. *Att. Acadam.* 32.

Sect. 2.
Corpus cum
causa, What
it is.

THis Writ is very like to the former, and doth issue out of the Chancery, and is to remove both the body and cause of a Prisoner in Prison upon an Execution from the Upper Bench, or any other Court, there in Chancery to lie in Prison till he satisfy the Debt.

Procedendo
Writs of Pri-
vilege.

If a man be sued in an inferior Court, which assumeth more then it hath Jurisdiction, as if it sue for more then it hath Conscience, as the Sheriffs Court in Guild-Hall London for above 5. l. an Hundred Court or the like above 40. s. The Defendant upon Bayl given, may have a Writ called *Habeas corpus cum Causa*: and if the Defendant do not put in Bayl above, the Plaintiff for want thereof may get a *Procedendo*, and so remove it down again.

There are also Writs of Privilege grantable to Officers of Courts, being sued in other Courts, to stay these Suits. 35. *H. 6. 3.*

Sect. 3.
Certiorari,
What it is.

Procedendo.

C*ertiorari* is a Writ issuing out of the Chancery to an inferior Court, to call up the Records of a cause therein depending, that conscionable Justice may be therein ministred, upon complaint by Bill in that Court, that either he hath had or is like to have hard measure therein. And if when the Record is brought into Chancery, he prove not his Bill, the other Party may have a Writ of *Procedendo*, to send the Record back again into the same Court whence it was sent for, there to be determined. *Stat. 2. H. 5. 2. 21. Jac. ch. 7. & 21. F. N. B. 242.*

By this Writ also Indictments and Records are sent for and removed from inferior Courts into the Upper Bench and Common Place. And it seems in most Cases the Records are first

first to be sent into the Chancery upon a Surmise by this Writ. And from thence they are to be sent into the Upper Bench or Common Place by a *Mittimus*. A Writ of Error, is a *Certiorari* in it self.

Mittimus.

A *Recordare* is a Writ issuing out of the Upper Bench, or Common Place, directed to the Sheriff, commanding him to send a Platat that is before him in his County Court without Writ, into that Court from whence the *Recordare* came, to the end that the cause may be there determined. And the Sheriff is hereupon to summon the other Party to be in that Court, into which the Plaint is to be sent at a day certain. And of all this, he is to make a Certificate under his own Seal, and the Seals of four of the Suitors of the same Court.

Se&t. 4.
Recordare,
What it is.

A *Pone* doth nothing differ from this, but that a *Pone* is always to remove such Suits as are before the Sheriff by Writ, and not by Plaint only; but the *Recordare* is to remove the Suit that is by Plaint only without Writ. *F.N.B.* 70. 71.

Se&t. 5.
Pone, What
it is.

If this Writ be sued out by the Plaintiff in the Action in the County Court, he may have it without shewing any cause at all. But if it be sued out by the Defendant, he must shew some cause, as in a *Replevin*, that the Defendant avoweth for damage fasant; and the Plaintiff doth justify for common of Pasture which is a Plea touching Freehold, and therefore may not be without Writ. *F. N. B.* 70. B. 119. 1. *K. Finchley*, 444. See *Stat.* 43. *Eliz.* 5.

A *Accedas ad Curiam*, is a Writ issuing out of the Upper Bench, or Common Place directed to the Sheriff, commanding him to go to such a Court of some Lord, or Franchise, as Court Barons, or the like, being no Court of Record, where a Plaint is sued for taking of beasts as a Distress, or the like; or a false judgement is supposed to be given in some Suit which hath been in that Court. And by this, the Sheriff is there to make Record of the same Suit in the presence of the Suitors of the same Court, and four

Se&t. 6.
Accedas ad
Curiam, What
it is.

Knights of the County. And of this he is to make Certificate into the Court above at the day appointed by the Writ. *F.N.B. 71. Plow. 74. Finch 444.*

This Writ cannot be had without shewing of some cause for the removal of it, as that a Free-hold is in question there, or some forraign Plea is pleaded there, not triable in that Court, or such like. *F.N.B. 70. 119.*

All these three last Writs, are to no other purpose but to remove a Suit into one of the Courts above, and are of the same nature with the former, and as a *Certiorari*. And upon the removal, the Suit in the inferior Court is at an end. And if in these cases the Party, or the Officers of the inferior Courts proceed after they have received these Writs, the Party that sued out the Writ, may have an Attachment against them. And after the Writ is once sent away in these three last Cases, it shall never be sent back again, but it must be ended in that Court whither it is sent.

Attachment.

The end of suing out all these six fore-named Writs, is to prevent a Judgement or Tryal in the Country Court, which an Injunction out of the Courts of Chancery or Requests also will.

Sec. 7.
Procedendo,
What it is.

THe Writ called a *Procedendo* (having reference to the former Writs) is a Writ lying where an Action is sued in one Court, and then is removed into an higher Court, the Chancery, Kings Bench, or Common Place, by some other Writ; and upon the opening of the Case there by the Defendant, it appeareth there was no cause to move it, or the matter in the Bill whereupon that Writ issued out is not well proved; in this Case, the Plaintiff shall have this Writ to send back the matter into the first Court from whence it was fetched, there to be ended. *Terms of the Law.*

The Writs called a *Prohibition* and a *Consultation*, having some affinity to these, we shall say as much as we have to say to these in this place.

CHAP. X.

Of a Prohibition, and a Consultation.

A Prohibition, is a Writ that issueth out of the Chancery, Upper Bench, or Common Place, to stay something that is about, or begun to be done, or to stay some Suit in some inferior Court, Spiritual or Temporal. It hath been granted, and is grantable to stay Suits in the High Commission or any Spiritual Court, in the Court of Requests, Council of the Marches of York, Admiralty, Constables Court, County Court, Court Baron, or the like; and in such Cases wherein they have not Jurisdiction, in this case the Party grieved may by this Writ stop their proceeding there. But if it appear to these Courts, that the matters for which the Party complaining was impleaded or sued, are such as are proper to those inferior Courts, and ought to be determined there, then the Party Plaintiff in the first Suit shall have a Consultation to command the Judges of the inferior Court to proceed again, and the cause shall be remanded to them. It is used to be directed to the Party Plaintiff in the first Suit, the Judge and Officers of the Court to forbid them to proceed any further in the Suit; and if they do so, an Attachment may be had against them. And upon a Prohibition in the Spiritual Court, the Party may appear and go to Trial; and if thereupon it be found against the Complainer, a Consultation shall be granted. *Finches Law. 450. F.N.B. 43. Cook 4.127.*

Sect. 1.
Prohibition,
What it is.

IF the Spiritual Courts meddle with things they have not to do, as if they take upon them to determine questions about Title of Land, or Charters of Lands devised by Will, Debts on promises, Trespasses, Wills, or the like: Or if they entertain Suits there for any thing else, for which a man hath his ordinary remedy in other Courts; Or if in these Courts, in such matters as wherein they have Consuance, as touching Tythes, Marriage, Legacies of Chattels real or personal, and defamatory words for which no Action lieth at the Common

Sect. 2.
In what case
this Writ lyeth, or not.
To the Spiritual Court.

Law, or the like ; if in Suits about these things, they go about to countenance men in Suits not justifiable and maintainable, or deny men those defences, discharges, and Pleas, that the Law gives them in those Suits, or do any way proceed against the Law, or the Rules of the same Courts ; the Party grieved may have relief by this means. *F.N.B. 41.42, &c.*

Seft. 3.
To the Court
of Requests,
Dutchie, or
other Courts
of Record.

IF these Courts of Equity, as the Court of Requests, or Court of Equity in *Chester*, or any such like Court, entertain Suits for Trespass, Waste, or the like, which have their proper remedy in other Courts ; Or in Cases of Equity go against Equity, and deny a man that right which other Courts will give him ; in these Cases he may have relief by this Writ. So if in the Dutchy Court, Marches Court, or any other Court of Record, they meddle beyond their Instructions, and Jurisdiction, they may be stayed by this Writ.

Seft. 4.
To the Coun-
ty Court, &c.

IF the County Court, or Court Barons, entertain Suits for Charters of Land, or for the Inheritance, or Freehold of Land, or for any Titles to Land, or for Debt, or Dammage, Goods or Chattels above 40.s. without a Justices, or make several Plaints of one entire Debt by Bond, or otherwise, it being above 40.s. or sue Trespasses there *vi & armis* ; the Party grieved before, or after Judgement, till Execution be done, may have this Writ to the Sheriff, or Bailiff to stop it. *Fitz.N.B. 46.47, &c.*

Seft. 5.
Consultation,
What it is.

Consultation is a Writ grantable, where a cause hath been formerly removed by Prohibition, from some inferior Court to one of the Courts at *Westminster*, and for lack of sufficient cause of removal is sent back again. *F. N. B. 50. old N. B.*

The Writs of Error, Attaint, and false Judgement, have some affinity with the last sort of Writs ; we will therefore touch upon them in the next place.

CHAP. XI.

Of Attaint, Writ of Error, and Faux Judgement.

WE told you of some VVrits which were appointed to correct and reform the errors and disorders of other Courts, as Attaint, VVrit of Error, and *Faux Judgement*.

An Attaint is a VVrit given to relieve a man that is hurt by a false Verdict in a civil cause. As where after a matter be pleaded to issue, a Jury of twelve men thereupon impannelled, give a Verdict against their evidence given to them therein, and thereupon Judgement is given; in this case, the Party grieved by this Judgement may have this VVrit against the other Party (be he Plaintiff or Defendant) in the first Suit, and against the Jurors, or such of them as be then living. And this shall be tryed by twenty four sufficient Gentlemen of the Country (whereof twelve at the least, must be of the Hundred where the Land lieth if it be about Land) whether the Verdict were true or false, upon the same evidence which was given before; for no more, nor other Evidence shall be given to this last, then was given to the first Jury. And if it be well done, or so much as is well done, shall be affirmed; and if this Jury do affirm the first Verdict, the Party complaining, though it be never so false, is remediless in Chancery or elsewhere, and he is to be fined, and ransomed at the pleasures of the Keepers of the Liberties, and to pay Damages to the Defendants in the Attaint. But if the first Jury be found guilty, Judgement shall be given, that the first Judgement be reversed, the Party restored to what he lost, that the Party for whom the first Verdict was given, be fined and imprisoned, that the twelve Jurors shall forfeit 20*l.* a peece (if the matter be above 40*l.*) otherwise 5*l.* a peece: And then are they defamed for ever, and for ever disabled to serve in any Jury, or give evidence in any cause in any Court of Record. *Broo. Attaint. F. N. B. Attaint.*

But this is a VVrit seldom used; for Gentlemen can hardly be drawn to appear in it; or if they do, hardly to attaint the

Attaint, What it is.

Sect. 1.
The proceedings in it.

the petit Jury; or if they do, the Judge is hardly drawn to give judgement; and if either of the Parties die, the Attaint ceaseth.

Sect. 2.
Writ of Error, what it is.

A Writ of Error lieth where a Judgement is given in the Common Place, or before the Justices in Assize, Oyer and Terminer, Mayor and Sheriffs of London, or other Court of Record against the Law, or upon undue and wrong Process; in this case, the Party grieved may have relief by this Writ; By which the Record shall be removed in the Upper Bench; and if the Error be found, it shall be there reversed. And if it be in the Kings Bench that the Error is, it is to be reversed in the Exchequer Chamber.

Sect. 3.
False Judgement.

BUT if the Error be in a Court which is not a Court of Record, it must be reformed by a Writ of false judgement: Which is a Writ lying where an erroneous judgement is given in any inferiour Court that is no Court of Record; as County, Hundred, or Court-Baron, then the Party grieved by the Judgement, may have the Writ, and remove all the Process of the Suit into the Common Place; and there it shall be examined; and if it be found erroneous, the Judgement shall be reversed, and the Suitors of the Court who gave Judgement amerced.

The Errors in both these Cases are sometimes in matter of Law, sometimes in matter of Fact; and sometimes in the Process. Sometimes it is in the Judgement, and sometimes in the Execution. *F.N.B. 18.19. Finchesley 484.*

The *Superſedeas* being a Writ that hath some likeness and reference to the Writs we have last spoken to, we shall dispatch that in the next place.

CHAP. XII.

Of a *Superſedeas*.

Sect. 1.
Superſedeas,
What it is.

A *Superſedeas* is a Writ lying in divers cases, and implies a command to forbear or stay the doing of that which
in

in appearance of Law were to be done, were it not for the cause whereupon the Writ is granted.

As for example, a man is to have Surety of the Peace against him of whom he will swear, *That he is afraid*; and the Justice of Peace of whom it was required cannot deny it. Yet if the party be formerly bound to the Peace, either in the Chancery, or elsewhere, this Writ lyeth to stay the Justice from binding the same party to the Peace. So if a Clerk of the Chancery, or any Officer of that Court be sued in another Court then their own, and he bring a Writ of Privilege, this is a *Superfedeas* in it self. *F.N.B. 236. Finchesly, 453.*

One may have this Writ of *Superfedeas* (as we have shewed) to suspend the Execution of a Warrant of a Justice of Peace, for the Peace or good behavior, and to stay a Suit in a Court, against an Officer in another Court.

If I bring a Writ of Error to reverse a Judgement, I may have a *Superfedeas* to stay Execution upon the Judgement; but if the Judgement be for Debt, or an Obligation single or double, or on a simple contract, I must first enter into a Recognizance to prosecute it with effect, according to the Statute of 3. Jac. c. 8.

But in case of Attaint, a man may not have a *Superfedeas* to stay Execution. *5. H. 7. 22. Plow. 49.*

If one be sued in any Court at *Westminster*, and a *Capias* or *Exigent* be awarded against the Defendant, in this case the Defendant may in the Term time out of the same Court, out of Term time out of the Chancery have this Writ to the Sheriff, if he have not arrested him, to forbear; if he have, to take Bail and to let him go. *F.N.B. 236.*

If one be Indicted before the Justices of Peace, and a *Capias* go out, the same Court or the Justices may by this Writ either stay the arrest, or command the Sheriff to take Sureties for his appearance. *F.N.B. 237.*

So if the Sheriff in his County Court do proceed in such causes wherein he hath not to do, the party grieved may stay him by this Writ; and so in divers other cases.

But where the Sheriff or Gaoler doth for at liberty one in

Sect. 2.
Where it may be had, or not.
The Law is altered herein now by the new Act of Parliament, whereby it is provided, That for any Judgement after a Verdict, no *Superfedeas* be allowed in it.

his custody upon an Execution, and after doth take him again, the Prisoner cannot have this Writ, but an *Andis querela*. 5. H. 7. 22. *Plow.* 49.

CHAP. XIII.

Of an Action of the Case in general.

Sect. 1.
Action of the
Case, what
it is.

AN ACTION of the Case is a Writ brought against one for an offence done without force, as for not keeping promise, for breaking trust, for slanderous words, deceit, or the like misdemeanor; and is called an *Action of the Case*, because the whole case, so much as is in the Declaration (save only the time and place) is set down in the Writ; and there is no other Action given in the case, save only in some few cases where the Plaintiff hath his choice to bring this, or some other Action.

Sect. 2.
How many
kinds of it
there be.

THIS ACTION is sometimes about words (that is) if another speak that to, or of me, by which I am any way damaged. And sometimes it is about *Deeds*, and then it is either for not doing what a man ought to do, either by his own undertaking, or the requiring of Law; or it is for doing something he should not do; or it is for doing something otherwise than he should do. That for *Defamation*, is either of great men, called *Scandalum Magnatum*; or it is of ordinary men. That for *Deeds*, is either upon an *Assumpsit*, or promise, upon a *Nuisance*, upon a *Trover* and *Conversion*, upon a *Deceit*, upon a *Conspiracy*, or it is upon some other *Non-feasance*, or *Mis-feasance*. Amongst Slanders and *Defamations* also, some tend to the disgrace of the person of another, some to the disgrace of the Title of his Land. Those against the person also do some of them tend to the peril of his life, some to his prejudice in his livelihood and estate, and some to his reproach in his name only. *Cook* 4. 92. *8cc. Dyer* 8. 72.

We shall begin with Actions for *Words*; and we will say a little to the Scandal of great men. But first of all we will give

give you certain general Rules that concern all sorts of *Defamation*, or the Slander of all sorts of men.

A *Defamation* also may be by *Deeds*, as by bringing an Action, or the like.

CHAP. XIV.

Of an Action of the Case for slanderous words.

VVE shall first give you in sundry Rules the General doctrine of Actions of the case touching Slanders; and these like the veins in the body, run through the body of all the cases hereafter following, wherein the words are or are not Actionable, as they fall within these Rules. And then we shall give you the cases themselves, as examples answering to these Rules.

Se^{ct}. I.
General rules touching this Action.

But (by way of Preface) It hath been said of old by some, *That these Actions are not favored in Law*; and it hath been wished of late by others, *That they had less countenance in the Courts of Justice*: and it is thought a dishonor to the Law, that they have so free and frequent a passage through these Courts, as they have. To which (with reverence to the men) I must beg leave to deliver my opinion, *Tempora mutantur, & nos mutamur in illis*.

Who doth not know what a foul sin the sin of slander and backbiting is! what censure the word of God (that speaks of things as they are) gives it! How frequent it is in these Dissenting, Maligning, and conflicting times! How much all sorts of men; and of the greatest, and best sort of men have suffered by the Scandalous tongues and pens of wicked men! The wound that is hereby given to the Name (as precious to a good man as his life) as it is unseen before it be given, and so cannot be prevented: so is it after it is given hardly to be cured; for it is like a burning by a coal of *Juniper*, which will leave a *Scar*; *aliquid adhaerebit*; when by report I have attracted a prejudice against a man, though after I know the thing reported to be false, yet (my fault it is I confess) I can hardly think so well of him afterwards, as I did

Pf. 50. 19, 20.
Jer. 6. 28.
Num. 14. 36.
Prov. 10. 18.
Jer. 9. 4.

There are Tongue Smitters, as well as hand-Smiters.
Psal. 51. 2.
Psal. 120. 3, 4.

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hand-Smiters.
Psal. 51. 2.
Psal. 120. 3, 4.

before, and these wicked slanderous tongues certainly do toil mens reputations. I cannot see any reason why these Suits should be discouraged or suppressed, rather than Actions of Trespais done to mens Bodies and Estates; the wound given to the Name is worse and more mischievous; and therefore (for my part) I think it would be more dishonour to the Law, and the Professors thereof, if men shall be remediless herein; and it will be a better policy to countenance a man wronged in his address to his lawfull Action, which the Law hath prescribed for his remedy, then by suppressing the remedy to advance the mischief which must needs follow. Nor can I think it any excuse *in toto*, or *a tanto*, that men are in choler when they speak, and so are metaphorically drunk with their passion, no more then it will excuse a man that doth kill, wound, or beat another, that he is in his anger, or drunkenness; it doth encrease the offence rather: He must be punished for it when he is sober and fresh. Far be it from me notwithstanding, to animate men to Suits of Law, that are already too forward thereunto, For my advice is, that men suffer many, suffer any, suffer all things, rather then go to Law; but I would have the false tongue cut out, the slanderer leave his slandering. And now we will give you the Rules.

1. In these Actions for words, the Law doth much heed how the words do sound and are esteemed amongst the men of the place where they are spoken, whether they be odious in the estimation of men or not. And for this purpose, it is held that words may be actionable in one Countrey, that being spoken in another Countrey, are not actionable; and this I take to be the most sure and best touchstone of all actionable words.

2. The sense of the words in these Cases, is much looked upon by the Law, and for the finding out thereof, the occasion, subject matter, and coherence of the Discourse must be weighed: *Sensus verborum sumendus ex causa dicendi.* Cook 4. 16. And they are to be taken as they are spoken *Coniunctim & uno halitu*. New Book of Entries, F. 22. 6.

3. All scandalous words which touch or concern a man in his

his life, as to say he is a Traytor, Thief, or the like, or which touch him in his Liberty, as heretofore to have said of one, *He was Villain to I. S.* or which concern a man in Member in any corporal punishment, as to say, *a man hath stolen six pence*, (which is petit Larceny) or the like: Or which scandal a man in his Office, or Place of Trust, as to say to a Judge or Justice of Peace, *He is a corrupt Judge or Justice of Peace*, or the like; or which slander a man in his Calling, or Trade by which he gets his living, as to say to an Attorney, *You are a cheating Knave*; of a Tradesman that lives by buying and selling, *He is a Bankrupt*, or the like; or which tend to the loss of a mans preferment, as to say to a man about to be preferred to a Benefice, *That he is an Heretick*: Or of a woman like to have a Husband, that *she is a whore*, or the like, if by this means they lose their preferment; or which charge a man to have any dangerous disease, by reason of which he ought to separate himself, or be separate by the Law from the society of men, as to say a man hath the *French Pox*, or the *Plague*, or the like: Or which tend to the slandering of a mans Title, as to say, *He hath no estate in his Manor*, when he is about, and hath need to sell it, or the like: Or which tend to a mans dis-inheritance; as to say to an Heir to Land, *He is a Bastard*, or the like: Or which tend any way to a mans particular Dammage. All such words are Actionable. *Cook* 4. 13, 14, &c. *Cook*, 10. 130. *Dyer*, 26. 72. This general Rule for the clearing of it, doth admit of many Extensions, and many Exceptions and Limitations, which we shall lay down in the Rules that follow: And first of the Extensions.

4. Many words (though of themselves they be not Actionable) yet being equivalent to words that are Actionable, may bear an Action. *Pasche* 15. *Car. B. R. agreed*; for they may *prima facie*, sound from the mouth of the speaker in the ears of the hearer as bad as any Actionable words.

5. It matters not how the words (if they be Actionable) be published or divulged, whether by writing or speech; for the Action is mainainable in both Cases: A man might have been charged in this Action for a slander by a Bill in the Star-chamber, and so he may be now by a malicious Indictment. *Cook* 4. 14. 15.

6. It

6. It is all one, as to the maintenance of the Action, if the words be spoken or written to the person slandered before his face, or of him behinde his back : *Old Book of Entries. Cook 4. 14. 15. & Hob. Pl. 292.*

7. Nor is it material whether they be spoken in the second or third person ; for the Action is alike maintainable in both Cases. *Co. 4. 14. 15. 16.*

8. Nor is it material in what language they are written or spoken, if the hearers do, or may attain to understand it. *Hob. Rep. Pl. 165. 236. 351. 236.*

9. Nor is it material whether the words be uttered by way of affirmation, as *A. is a Thief* ; or hearsay, or report, as *I. S. saith, A. is a Thief*, and *I. S. did never say it* ; or by way of Interrogation, as, *Hast thou been at London to change the money thou didst steal from me ?* or by way of negation, when it doth imply an affirmation, as *you are no Thief*, or the like ; for in all these Cases they are Actionable. *Pasche 15. Car. Appletons Case. B. R. Hill. 4. Jac. B. R. Lady Morrisons Case.*

10. Nor is it material whether they be uttered by way of earnest, or seemingly only in jest, but with a minde to slander ; for the Action will lie in both Cases.

11. Nor is it material whether the man that uttereth them be sober, or drunk with wine, or passion ; for the Action lieth alike in both Cases.

12. Nor is it material whether the words be delivered in one or more sentences or speeches.

13. Nor is it material how the words be uttered, either directly or indirectly, and obliquely, for the Action doth lie alike in both Cases.

14. The slander that doth concern a mans life, liberty, member, or any corporal punishment, his Office, Trust, Calling, or that charges him with a foul Disease, to cause a separation, these Actions are maintainable without averring in the Action any particular Damage come to the Plaintiff by the slander.

15. This Action may lie for words, though the words in a proper speech cannot be true ; as if a woman say to me, *Thou hast stolen my goods* ; for she hath no goods but what is her Husbands ; adjudge. *M. 9. Jac.*

16. If

Averment.

16. If a man speak against another, words that are not in themselves Actionable, as that he is a *Rogue, Knave, Cozener, Fornicator*, or the like; yet if the Party can make it appear by proof he had any special loss hereby, he may perhaps have an Action for these words: But then he must make a special Averment in his Action of his loss. Thus much of the Rules of Extension: Now to the Rules of Limitation or Exception.

17. When words in themselves Actionable are spoken too generally, so that they are uncertain, they will not then bear an Action; as to say *a man deserves to be hanged*. *M. 4. 3a. B. R. He seeks my life*, or the like. *Cook 4. 15. Hob. Rep. pl. 196. 332. 3.*

18. Words not positively affirmative, will not bear an Action; as, *I fear you will be charged with Felony*, &c. *Hob. Rep. pl. 381.* Or, *arrested for Felony*. *Hob. pl. 286.* or the like. *Hob. Rep. pl. 381.*

19. Words of a double and indifferent meaning, when one of the senses is good, will not bear Action; for *verba accipienda sunt in mitiori sensu*; as if one say of another, *He did burn my Barn*. *Cook 4. 20.* for it may be a Barn without com; or *He hath the Pox*; for it may be the ordinary, not the French Pox. *Cook 4. 27.* for these Actions are not to be maintained by a strained construction upon mens words, but where the words do clearly import a slander: But if the common ordinary and usual sense and intent be the worst, that sense shall be taken, as *A. had the use of her body*, this is to be taken in the worst sense. *Hill. 4. Jac. B. R. Hob. Rep. pl. 350. 236.*

20. Words of a doubtfull meaning, that have no clear and certain intendment, especially if they be insensible, will not bear an Action; as to call one *filching Fellow*. *Coo. 4. 15.* Or to say, *He smells of a murder*. *Hob. Rep. pl. 350.* or the like. And yet if they have a bad intendment in the Countrey where they are spoken with an Averment thereof, they may be Actionable. *Hob. Rep. pl. 394. 323.*

21. Actionable words may be qualified, and made unactionable by subsequent words; as *Thou art a Thief* [for] *thou*.

thou hast stolen a Tree, my Apples, or Corn, or the like. But if he say, *Thou hast stolen my Wood out of my barton, Corn out of my Barn, or the like*; these words are actionable. *Hob. Rep. pl. 97. pl. 406. Cook 4. 19. Hob. Rep. pl. 381. 406.*

22. Words that do not import an act, but an intent or inclination to a thing, are not actionable. *Coo. 4. 19.* To say, *He is a thievish Fellow; he had a minde to have killed me.* *Coo. 4. 16.* And yet if that intent be an offence punishable as an intent of Treason is, the words are Actionable. And therefore Adjective words, as to say, a man is a *Thievish*, or *Trayterous*, or *Seditious fellow*, are not Actionable. And yet if they be such as import an act done, as *perjured Knave*, or the like slander in a mans Office, as to a Judge, *Corrupt Judge, Bribing Knave*; or slander to a mans Trade, as to a Tradesman, *he is a Bankrupt fellow, or Bankruptly fellow*, or the like: these words are actionable.

23. Words that are impossible, are not Actionable; as to say, *He is perjured, and that may be proved by stakes, &c.* *Coo. 4. 19.* *My Mare doth piss as good drink as I.S.* (being a Brewer) *makes.* *Mich. 15. Car. B.R. or the like.*

24. When it doth appear in the Action brought, that the words spoken are no damage to the Plaintiff, no Action will lie upon them; as when he saith, *Thou hast killed my wife, or kinsman*, and the Record shews him or her to be alive. *Coo. 4. 16. Hob. Rep. pl. 11.* But if it appear not in the Record, some say the Plaintiff must aver it, or his Action is not well laid; others say the Defendant must set it forth, and this is the safe way; and for this there seems to be better reason. *Hob. Rep. pl. 11.*

25. Words that are uncertain in themselves, will not bear Action, as to say, *Thou hast taken away the money of I.S.* for it may be done without Felony. *Hob. Rep. pl. 11.* *Thou hast taken away my money.* *Hob. pl. 136.* and these cannot be made certain by an *Innuendo*. But to say, *Thou didst kill a woman great with child; Innuendo A. ux. or cuiusdam R. defunct.* was ruled good, *Mich. 2. Ja. B.R. And A. sued B. for saying my brother (Innuendo the Plaintiff) is perjured, and upon not guilty pleaded, and verdict for the Plaintiff; it*

Innuendo.

was

was adjudged good; for these words are certain in themselves, not like to this, *one of my brothers is perjured.* *Wisemans Case Mich. 3. Ja. B.R.*

26. When the person charged is uncertain, no Action will lie; as if one without any other speech precedent say, *one of the servants of I.S. is a Thief*, and he hath divers servants, or the like. *Coo. 4. 17. Hob. Rep. pl. 35 1.* and yet words somewhat uncertain at first, by an Averment and the Verdict of a Jury may be made certain, in case where they are spoken of one man in certain, as, *my brother is perjured*, and averred it was meant of him, and the Jury found it so. *M. 3. Ja. B. R. Wisemans Case. Hob. Rep. pl. 35 0.* So likewise when the thing charged is uncertain, no Action can lie for the words. *Hob. Rep. pl. 145. 119. Coo. 4. 25.*

27. When there be actionable words spoken amongst others, but upon the whole discourse, it appeareth the party did not intend them in a slanderous sense, these words are not actionable: As if their Dialogue be about killing of Hares, and one saith, *He killed six on one day*, and thereupon the other saith, *He is a murderer*; these words here will not bear an Action; so if one say to another, *Thou art a Traitor, for I trusted thee to buy Land for me, and thou boughtest it for thyself*: Or, *Thou art a Thief, for thou robbedst my Orchard of my Apples*; and if in this case the Party sue upon those single words, and name not the rest; the Defendant may in his plea shew all the words specially, or he may plead *non culp. modo & forma*, and give the special matter in evidence; or he may traverse these words, and justify the speaking of the words, as they were, or he may upon the evidence have the words found specially, as he shall see cause. *Coo. 4. 13.* or he may plead not guilty to a part, and justify the rest. *N.B. of Entriss. f. 24. a. 25. a. 26. a. 27. a.*

28. The words spoken though Actionable, must be spoken in the hearing of some body; or else the Action will not lie; the Writ doth say so, *in presentia quam plurimorum liceor.* &c. *Hob. Rep. pl. 63.* And (as some say) they must be spoken in a language that the hearers do understand; and therefore, if they be spoken in Welch, that no Action will lie, unless one

of the hearers do understand Welch, and some judgements are on this side, and others hold the contrary: and (in my Opinion) upon better reason; for a man may call another *Thief* in Latine or Welch, in the hearing of such as understand it not, but they may remember the word and ask the meaning, and so a man may be grievously slandered without remedy: And yet it is held, if a man send or give a slanderous Letter to the Party slandered, or speak such words in one mans ear only in private, both these are Actionable. *Hil.* 38. *Eliz. Cramp. Jur.* 13. *Hob. Rep. pl.* 93. 276.

29. The Charge must be false, for the Writ is *falso & malitiose*, and so it must be, or it is not actionable; for if the thing that he is charged with by the words be true, the Defendant may justifie it: But he must see he do not plead nor guilty, but make a special Justification.

30. The words must be spoken purposely, and therefore it is considerable here *quo animo* they are spoken; for the Writ is *malitiose*, and so it must be, or the words are not actionable. And therefore it is held, that if a Minister preaching, recite a History; or a Lawyer pleading, do innocently and pertinently speak words whereby a man is charged with a crime, and it prove false, this is not Actionable; so if one advise his friend to forbear the company of *T.S.* for he hath the Pox, &c. This is not Actionable. 40. & 41. *Eliz. C.B.* And yet if such men shall make this but a Clcak of their malice, *contra*. And circumstances will clear it with what mind he did it. *Mich.* 31. *Jac. Brooks Case. Hob. Rep. pl.* 399.

31. If the ground of the dammage do not appear in the Action, no Action will lie; as to say a man did *Cozen by false weights*, and do not say he is a *Tradesmen*, or getteth his living by buying and selling. *M.* 17. *Car. B. R.*

32. When it doth not appear that he that spoke the words, had notice of the ground or occasion of the offence, no Action will lie, as *A. hath thieves in his house*; for he may not know it.

33. If this slander be in a course of Justice, and be not malicious and touch a mans life, it is not Actionable. *Kelw.* 26. And therefore it lieth not against a man for suing a Writ of forgery

forgery of false Deeds, or exhibiting Articles against a man for his good behaviour. *Co. 4.* But herein let the Party take heed he go not out of the Rode of Justice, nor say more herein then is necessary; for if a Robbery be done, and common report is that *I. S.* hath done it, he may arrest him; but if he say he hath done it, this is actionable. *Hob. Rep. pl. 105. 238. 381. 71. 112.* so one may indict another for such a thing. But if I indict a man for Felony upon ground, this is justifiable; if I say he hath done the Felony, and if it be not so, or I will speak of it in an Ale-house, I may be charged in this Action for a slander; and I cannot justify the speaking of slanderous words upon a fame, arrest, imprisonment, no nor upon Indictment; for if I justify, I must prove he is guilty of it. And yet if there be malice, and a conspiracy in a course of justice to take away my life, here I may have an Action of the Case for the slander and vexation. As if two or more conspire to indict me for a Felony, and I be on a tryal *legitimo modo acquiescens*, I may have a Writ of Conspiracy against the Indictors. And if any man procure me falsely and maliciously to be indicted, arrested, and imprisoned, though I be not acquitted, I may have an Action of the Case. *Pasche 4. Jac. B.R. Roll. 372. Hob. Rep. pl. 11.* But if upon the Tryal there do appear any probable cause for the Indictment and prosecution, this Action will not lie. *Hob. Rep. pl. 350.*

34. Where any thing is the cause or ground of Action, or Averment, tends necessarily to the maintenance of it, this thing must be averred to be, or not to be, as the case requires, or the Action Averment will not lie; as if one say, *my son stole his Hens*; in his suit he must aver he is my son. *Mich. 14. Car. B.R.* If I say, *he that dwels in the next house to I. S. one R. L. did rob me*; if he sue, he must aver he dwels in the next house to *I. S.* *Pasch. 7. Jac. Clerks Case.* So if I say, *Pritchards man robbed me*; if he sue, he must aver he is *Pritchards* man. See *Co. 4. 16. Hob. rep. f. 8.*

35. If the words in themselves be incertain, and will not bear an Action, as to say, *one of my brothers is perjured*, they may not be made actionable by averment, or an *Innuendo*, as words *Innuendo* of a double sense, by an *Innuendo* he meant the worse sense, as *Pox*, *Innuendo* the French *Pox*. *Cook 4. 17. 20.* So

to make incertain words certain, *He took my money with a strong hand, Innuendo Felonice. M. 15. Car. B. R. He forged a writing, Innuendo* such a Deed. *Hob. Rep. pl. 4. 48.* The office of this word is only to contain and design the same person which was named incertain before, as thus: two are speaking together of *B.* and one of them saith, *He is a thief;* there *B.* in his Count may shew, that there was a speech of him betwixt those two, and that one of them said of him, he (*Innuendo* the Plaintiff) is a thief; or else to declare the matter or sense of the words themselves, which was certainly expressed before, as thus; *A.* and *B.* speaking of *C.* *A.* said, *that C. was a Traytor,* to whom *B.* said, *that he was so too;* in this case if *A.* bring an Action for these words, he may shew in his Count that there was a speech betwixt him and the Defendant of *C.* and that the Plaintiff said to the Defendant, *that C. was a Traytor;* and that the Defendant said then to the Plaintiff, *that he (Innuendo the Plaintiff) was so too [Innuendo, a Traytor]* in both these cases the (*Innuendo*) is good, because it doth its office in designing of the person, as also in declaring of the matter or sense of the words, which was certain before. *Mich. 20. Jac. B. R.* But an (*Innuendo*) cannot make a person certain, which was incertain before; nor alter the matter or sense of the words themselves. *Cook 4. 17.*

Out of all which it appears, that in all cases where this Action will lie for words, the words must have these qualities in them.

1. They must be particular.
2. They must express or imply an affirmation.
3. Sufficient certainty both in the person, and thing charged.
4. They must be plain.
5. The thing must be directly, and in plain terms, and not by inference, or argument applied to the person charged.
6. The things charged must be such as (if true) were against some Law, and the party may be punished for them, or he must have some special prejudice by the words which he must aver.
7. The charge must be out of a course of Justice.
8. The words must be sensible and plain.
9. They must be spoken in the hearing of some body.
10. And in a Tongue that some of the hearers do or may understand.
11. The thing charged by the words must be false.

12. The words must be spoken maliciously, and purposely to slander. 13. The thing charged to be done, must be possible.

S *Scandalum Magnatum*, is a wrong done to some eminent person of the Land, as *Duke, Earl, Baron, Chancellor, Treasurer, Privy Seal, Justice* of the one Bench, or of the other, by false news, or false messages, whereby debates, and discords between them, or any Scandal to their persons, may arise. *Stat. 2. R. 2. ch. 5. Westminster 1. chap. 34.*

Sect. 2.
Scandalum Magnatum,
What it is.

In this case the party Defamed may have his Action in the name of *the Keepers of the Liberties*, and his own, upon the *Stat. of 2. R. 2.* And hereby he shall recover Damages for the wrong, and the party shall also be otherwise punished. And if the Slander be divulged in the nature of a Libel, it is punishable by Indictment. And great Fines are imposed for this offence, for that the reproach of such persons, is the reproach of the State it self, and of the Commonwealth. *Cook 5. 125. Old Book of Entries 593. Cromp. Jur. 35. 19. 13.*

IT matters not in what manner the words or reports be published, whether by speech or writing, reported from another, or spoken by ones self; or by hanging up a writing in any open place; for publication may be by writing as well as by speech. *Cromp. Jur. 13.*

Sect. 3.
Where and for what words or deeds a man may have this Action of *Scandalum Magnatum*, or not.
For the manner.

But if by any of these ways such persons had been slandered by these, or such like words as follow, they might have been relieved by this means. And this action did lie for these words, *You maintain sedition against the Kings proceedings, or you uphold and countenance them that do so. Cook 4. 13. Or you are a Traytor to your Prince, or Rebel against him. Sur. Monteaigles Case, M. 9. Jac. B. R. Or, you are a base Lord, and a pauntry Lord, and keep none but Rogues, and Rascals like your self. Earl of Lincolns Case. Trin. 5. Jac. B. R. Or, it is your grief that you are a Subject. Count of Salops Case. M. 40. & 41. Eliz. B. R. Or you charged them that transport, or import Merchandizes to, or from such a place, that they should not pay custom for it, nor suffer the Customers to search them. Old Book of Entries, 593. Or you have no more conscience then a dog; so you have goods, you*

For the matter.

care not how you come by them. Duke of Buckingham's Case. *M.4.H.8.Rot.659.* Or to a Chief Justice, *You are a corrupt Judge.* *Cromp. Jur. 35.* Or you said, *You would winde my guts about your neck.* Lord *Abergavines* Case. *Cromp. Jur. 13.* So also it is thought of these words, *You are used to do things against Law, so impound the Subjects beasts, and keep them in a Castle that they cannot be replivied; or you have sent Commissioners to spoil the Country;* and generally any words which being spoken to an ordinary man, will give him an Action, being spoken to such an eminent person, will give him this Action. But if a man do bring a Suit in a Legal way, or do Legally proceed by Indictment, or otherwise for any misdemeanor; as if a man sue a Writ of Forger of false Deeds against a Peer of the Realm, or cause him to be indicted for a Crime, it is doubted whether for these Acts this Action be given. *Dyer 285. Kel. 27. Cromp. Jur. 35.* Yet for a conspiracy to indict these persons, they have remedy as other men have.

Sec. 4.
Where and
what words
will bear an
Action or not,
for others;
and how.
For the man-
ner of speak-
ing.

IT will lie for words spoken thus, *I will justifie that Barns is a thief.* *Trin. 9. Jac. B. R. Barns Case. Adjudge.*

It will lie for speaking words thus, *What I. S. that Thief?* *Nellons Case. Pasche 15. Jac. B. R. and Hardwicks Case. 40. Eliz. Co. B. So, have you brought my horse you have stoln?* *Mains Case. Adjud. Trin. 18. Jac. B. R. Or the 20. 1. you stole from me?* So for these words, *Thou wast in the Tower for high Treason.* *Cur. Non. Jac. B. R.* but this Case others doubt.

It is said, it lieth for this, *I did dream this night that you stole a horse:* but this seems to be a strange Case, and not so much as to report such a thing as is false. So it lieth for saying, *I think in my conscience A. is a Thief.* *Adjudge. Hob. Rep. 152.* For saying, *Did not you kill I. S.?* It will lie for saying, *That I. S. told me that A. was a Thief, when I. S. never told him so.* *M. 9. Jac. B. R. Adjudg.* But it doth not lie for saying, *A. reported that B. did steal a horse,* if it be true he did report it; but then it must be so alledged in pleading, *per Just. Tanfield. Hill. 4. Jac. B. R.*

And it is said, it will not lie for this, *Will you not leave your stealing?* It lieth for saying thus, *Hast thou been at London*

don to *change the money thou didst steal from me?* Mic. 15. Car. B. R. It lieth for calling one *Thief* in Welsh, or any other unknown language; but then it is said it must be averred in the **Action**, that one at least of the hearers did understand it. And it is said, it hath been adjudged in the Exchequer Chamber, that otherwise it will not lie. But I wish it may be well weighed; for they that hear the words may carry them, and get the meaning from another that can interpret them; and so a man may be grievously slandered without remedy; and it is all one in reason, not to know the men, as not to know the tongue; but if one slander a meer stranger, that one of the hearers do not, perhaps never shall know, is not this **Actionable**? It is doubted of words spoken thus, *I am persuaded thou wouldst, if thou couldst, kill the King.* If *I. S.* and my self be speaking together of one *Fox*, and I say thus, *Go tell him he is a thief, and I will justify it, though I. S. never tell him so.* M. 9. Jac. B. R. *Foxes Case.*

I did tel Mr. *Carus*, That *I am neither traitor to my Prince, nor rebel to my Countrey*, as *I. S.* is, and these words are spoken to *Corel*; the words are **Actionable**, though never spoken to *Carus*, nor to any but to *Corel* himself. *Curia*, M. 9. Jac.

The Declaration was, That the Defendant *dixit de prefato* the Plaintiff, *thou, Innuendo, &c. hast stole, &c.* and it was adjudged good: for *dixit de prefato*, is all one with *dixit ad prefatum*, and these words may be spoken in his absence. *Stoners Case.* Pasche 5. Jac. B. R. & *Dickensons Case.* adjudg. M. 20. Cook B. *Eadem ratione*, to say to ones face, *He is a thief.*

Words in the second person, the party not present, **Actionable.**

If one exhibite Articles in writing to a Justice of Peace, and write thus, *I. H.* who was the informer, *doth charge K.* (who is the Plaintiff) *that he did commit Burglary in breaking of my house, & stealing of my goods*: an **Action** will lie for this, though he change the person. adjud. Pas. 9. Jac. Pors case. B. R.

If a Minister in a Certificate to his Ordinary where he was of duty to certify some other matter, had inserted a slander, an **Action** will lie for this. *Reads Case.* M. 7. Jac. B. R.

To write a letter in private sealed to the party slandered, unless he deliver it to his own hands, is (as it seems) **Actionable**; so to speak it but in one mans hearing, and bid him keep counsel. M. 9. Jac. B. R. *Hob. Rep.* pl. 63.

It.

It lieth for saying, *You are no thief*. Pasche 19. Car. but it must be intended Ironically. It will not lie for saying, *that I have Articles against you for Felony*. Adjudged, B.R. Nor for this, *I have matter enough against I.S. about the death of I.S.* Nor as it seems for this, *I.S. hath found Felony in I.S. and can prove it*. See *Hob. Rep. pl. 3. 395. Quere* the last case.

It will lie for saying, *I will prove that you have stolen my books, or my horse*. Pasche 15. Car. B.R. So *I can prove you a thief, and ten men will justify it*; Pasche 5. Jac. B.R. So, it will be proved by many vehement presumptions, *that I.S. was a plotter of the death of I.R.* Pasche 7. Jac. B.R. It is said it lieth for this, *I.S. is a Felon*; to which a stander by said, *take heed what you say*; to which he said, *is not he a Felon that doth conceal Felons, or steal trees?* Hil. 17. Jac. Newlands Case. Or *takes my good, upon Execution a Fortiori*; if the last words be first, they are Actionable.

And as it is in these cases where the charge is of Felony, so it will be where the charge is of a lesser offence, as to the manner of the speech.

It will not lie for saying, *One of you three, or one of the company* (where be more then one) *or one of you two* (where two be together) *is a thief*. Adjudge *Harris Case*. Or one of the servants of *I.S.* if *I.S.* have more then one servant, or one of my brothers, where I have more then one. *Cook 4. 17.* Or one that is near to *I.S.* or about *I.S.* or mine adversary, *hath done a felony, or other Act*; for any of these words, no action will lie.

Incertainy.

For this is altogether incertain in the party Charged to commit the offence, and an Averment will not help here. *Hob. Rep. 375. pl. 351.* And the Defendant in these cases may do well in avoidance of the Action, to set forth that there were more in the company.

It will not lie for these words, *One I.S. stole the horse that was lost*. M. 7. Jac. B. 3. *Reads Case*: So *Stiles stole my horse*, omitting the Christian name; but this last may by an *Innuendo* be made good; and yet some circumstances may make such words certain, and Actionable, as *Mich. 3. Jac. B.R.* as if the precedent conference were about one man in certain, or the like.

Wise.

Wiseman sued his brother for saying, *My brother* [Immuendo the Plaintiff] *is perjured*; upon *not guilty*, it was found for the Plaintiff, and Judgement given: and this difference taken where the words are incertain, as in the cases before. But where they are certain in themselves, so that it may appear that the speaker intended a person certain, they may be made certain, as before.

It hath been adjudged also to lie for these words, *Thou didst kill a woman great with childe*, Immuendo *I. uxorem cujusdam R.S. defuncti*. here the offence, and person committing it are certain. *Mich. 2. Jac. B.R.*

Foxcroft sued *Lacie* and declared, That a talk was between *Walter* and *Gwin* about a suit wherein the Plaintiff and others were Defendants, and therein the Defendant *Lacie* spoke these words, *These Defendants* [Immuendo the Plaintiff and the others] *are those that did help to murder I. S.* [meaning *I. S.* deceased] who was murdered by one *T. G.* who was hanged for it; this was adjudged to be Actionable; for words may be certain by reference. *Id certum quod certum reddi potest. Hob. Rep. pl. 119.*

If one say to a woman, *Your husband is a thief*; or to a man, *Your wife is a thief*, this is certain enough, and Actionable: but if he say your brother, or your son, *Contra*; unless the Plaintiff aver he hath but one brother, or one son, which is himself. *Trin. 14. Jac. B. R. per Dodridge.*

So likewise it will not lie when there is an uncertainty in the thing charged; as in these cases, for saying, *thou art a false thief, rogue*, or some such like thing. *Brook, Action of the Case, 112.* To declare for calling one thief, or *Verba similia*, is not good; but to declare for calling one thief, and to say further, *Ac eadem verba sapinus repetivim*, it seems good. *H. 41. Eliz. C. B.*

It is said, it was adjudged not to lie for these words, *Thou wast whipt about Taunton, or burnt in the hand or shoulder, for stealing sheep*. *Hils Case, Mic. 8. Car. B. R.* So it will not lie for saying, *Thou art a healer of Felons, or didst strain my Mare*, without averment that the words have such a meaning in the Country. *Cook 4. 25.*

It is said it lieth not for saying, *Thou hast cozened all my kindred*. *18. Eliz. B. R.* It lieth not for saying, *who ever is the falsest*

falsest thief in the county of Salop, what ever he hath stolen, I. S. is falseer than he. But these words are Actionable with averment, that there are Felons within that County, *Hastwoods Case*. Pasch. 1. Jac. B. R. Rel. 107.

It lieth for saying, *Thou stoldest a piece from me*. *Appletons Case* adjudged.

No Action will lie for a slander by Indictment, though false. 27. *Aff. Pl.* 12. nor for a false *Affidavit* in the Chancery, by which one is imprisoned. *Trin.* 41. *Eliz.* B. R. *Heirs Case*; nor against I. S. for taking a false Oath, by which bad Bail is taken instead of good Bail. *Trin.* 41. *Eliz.* B. R. Nor for preferring Articles in the Sessions, though false. *Coo.* 4. 15. Nor for Articles exhibited before a Master of the Chancery, for to have the good behaviour for prosecuting a legal course in the Countrey, though it be false and unjust, yet this Action will not lie. But the Party is to be punished in the same Court for the misdemeanor. *Trin.* 19. Jac. B. R. *Hunters Case*. But if things be inserted those Judges have not the Consuance of, *contra*, *Coo.* 4. 14. And if one Indict another, or charge him legally for a Felony where none is, nor any reason to charge him, here an Action will lie. *Trin.* 14. Jac. B. R. *Dennis Case*. But all these Actions must be *materiose indictavit*. For a slanderous complaint put into a member of the Parliaments hands it seems is not actionable. *Trin.* 21. Jac. It lieth against the Husband and Wife for the Wives saying, *Thou hast stolen me two Cocks* [*Innuendo*, &c.] these words are actionable, and shall be taken for two Cocks, and the *Innuendo*, and me, voyd. *M. 9.* Jac. B. R.

Sec. 5.
For the
matter of
the words
which ha-
zard a
mans life.

THIS Action lieth for calling a man *Traitor, Buggerer, Sodomit, Robber, Murderer, Felon, Thief, Sacriledger, House-Robber*. 30. *Aff.* 19. 27. *H.* 7. 14. 21. *Coo.* 10. 130. 4. 15. 16. &c. 27. *H.* 8. 14. 22. *Dyer* 26. 19. 236. *Newlands Case, Church-Robber*. *Trin.* 7. Jac. B. R. *Beringtons Case*. And so for saying, *A man hath committed Treason, Buggery, Sodomy, Burglary, Robbery, Murder, Sacriledge or Felony*. *Pets Case*.

It lieth not in our Law (as it seems) for calling a man *Heretic*, unless he have some special loss by it. 27. *H.* 8. 14. *See Quere*, *Hob. Rep.* in pl. 376. *F.* 397. It

It did lie for saying, *There is no King in England.* Trin. 37. Eliz. *Mayer Case.* adjudge B.R.

It lieth for saying, *Thou hast spoken words that are high Treason.* *Arwards Case.* Or, *Thou wouldst kill the King and all his Subjects, if thou couldest.* This was adjudged. *Synham's Case.* Hob. Rep. pl. 152. It is said it doth lie for this, *Thou art no true Subject.* Sir *William Walgraves Case.* M. 33. 33. Eliz. *Coo. B.* Or, *I am a true Subject, but thou servest one who is none at all.* *Sed Quere* at this; for it is said, that it lieth not for saying, *Thou art no true Subject to the King.* *Smiths Case.* 5. Jac. B.R.

It doth lie for saying, *Thou art an Enemy to the State.* *Chambers Case* 38. Eliz. B.

It lieth for saying, *Thou wast partaker with the Rebels in the North in their Rebellion.* But not for saying, *Thou wast partaker with the Rebels in the North,* and no more.

It lieth for saying, *Thou hast killed I.S. or murdered I.S. or poisoned I.S.* if he be *revera* dead when the words are spoken. *New Book of Entries.* f. 25.

And here some say, that the Plaintiff that doth sue, must aver in his Declaration that he is dead. But it is said to be adjudged to lie for saying, *Thou hast poisoned I.S.* albeit he be not dead. But this is clear, that if it appear by any part of the Record, that the Party supposed to be killed is alive, as if the words be, *Thou hast killed my wife,* the Action will not lie; and if the Plaintiff do not shew him to be dead (as it seems by the better Opinion he need not) then it concerns the Defendant to shew it in avoidance of the Action, *Coo. 4. 16. 14. New Book Entries.* f. 24.

It lieth for saying, *She hath sacrificed a child, to the intent to kill my mother.* *Lock versus Lock.* But it will not lie for this, *He smells of the murder lately done.* *Dyer* 317. yet to say, *He is infected with the murder lately done,* may be actionable.

It lieth for saying, *Thou hast poisoned I.S.* if he be dead. adjudge. *Bumfords Case.* Pasche 7. Jac. *Coo. B.* But against this Judgement. *Miles Case,* and the reason thereof in *Hob. Rep. pl. 11.* is objected, that he doth not say he did it *ex scientia* willingly: hereupon, *March fol. 36.* concludes it will not lie.

This reason will shake other Cases out of question, as *Thou art a mustherer, or hast murdered I. S. or hast killed I. S.* for it may be with giving Physick or otherwise, against his will, or in doing Justice, &c. for there is a *Homicide* lawfull and justifiable. But this is the common acceptance of the word, that he killed him voluntarily, and unlawfully, and therefore I think without question actionable.

It lieth for saying, *He took my wife by the hand, and said, thou and I will be married shortly, after that he dispatched his wife out of the way.*

It lieth for this, *I will call him in question for killing my Aunt, and I doubt not but I shall prove it.* Adjudg. 39. Eliz. *Webbs Case.* A. told me, she *poysoned her first husband.* adjudg. to lie for this. *Meggs Case.*

Styls & Lord. This Action will lie for calling one *Witch*, and so it hath been often adjudged, as in *Lewes Case.* M.13. Jac. and *Rogers Case.* Trin. 39. Eliz. and *Hil. 4. Jac. B.R.* And yet some Judgements have been given on the other side, and it hath been doubted. *Hob. Rep. pl. 155.* because there is a good and a bad *Witch*. But I think it is at this day unquestionable, and that reason of little weight; for the word imports a foul charge; both of them use unlawfull means, and have too much familiarity with the Devil. So it will lie for this, *The Devil appears to thee every night in the likeness of a man, and thou conferrest with him, and he giveth thee what thou askest, and therefore thou hast so much money.* Adjudg. *Hob. Rep. pl. 137. 155.* so for this, *Thou hast bewitched I. S. to death.* So it will lie also (as it seems) for calling one *Conjurer*; for the *Witch* and *Conjurer* both deal with the Devil; the *Witch* by agreement, the *Conjurer* by prayers, and such like powerfull means. So it will lie for saying, *Thou dost confer with an evil spirit.* But it will not lie for calling one *Inchanter*, or *Sorcerer*; for the former have personal conference with the Devil, but these meddle with medicines, and ceremonial forms of words called *Charms* without Apparitions. It hath been said also, that this Action will lie for calling one *Hag*, but this is doubted by others, unless he can aver that in the language of the Place it doth signify *Witch*.

This

This Action will not lie for these words, *Thou seekest my life.* Cook. 4. 16. Nor for these, *Thou didst write a Letter to one, [or hire one] or give one counsell to kill me.* Coe. 4. 16. or *wouldest have killed [or, robbed] me.* Trin. 4. Jac. B. R. Tanfields Case: Or, *Thou wentest about to poyson a childe.* Eatons Case. And yet is said to be resolved in the Exchequer Chamber in one *Passeys Case*, that it will lie for these last words. *March.* fol. 12. And then for all such like words, as in the Cases before, which do carry in their sound, a foul slander, and of something done. And it is agreed on all sides, that it will lie for these words, *Thou didst lie in wait to rob [or to murder] me.* Pasch. 5. Jac. B. R. So for this, *Thou didst procure one to lie in wait to murder me.* Adjudged.

And that in all Cases where the words import an intent, joyned with any overt act or attempt, That these words are actionable; for then the thing is punishable by the good Behavior or Indictment. And I finde it adjudged to lie for these words, *Thou hiredst a Rogue to come with thee to my house to murder me.* Suttons Case. Trin. 33. Eliz. B. R. And it was said to be adjudged for this, *Thou hast sent one to kill me.* And yet it will not lie for this, *Thou hast procured a perjured Knave to seek my blood.* 32. Eliz. Sir Edw. Hastings Case.

It is said to be adjudged to lie for this, *He sought my innocent blood.* Sir Edw. Hartberies Case, B. R. But this is doubted; for it lieth not for saying, *Thou seekest my life.* Hexis Case, Coe. 4. Nor for this, *Thou hast procured one to seek my blood.* 32. Eliz. B. R. Sir Edw. Hastings Case.

It will not lie for these words, *Thou wast the cause of the death of I. S.* adjudge, B. R. Prowse Case. Nor for this, *Thou art a blood-sucker, and seekest my blood.* Helliards Case. M. 37. 38. Eliz. B. R. But it lieth for this, *He is a man-slayer, and hath lain in wait to kill.* 28. Eliz. B. R. adjudge.

It is said, it lieth not for this, *He is a Felon, for he knoweth of a murder, and concealeth it.* Nor for this (as is said) *I. S. gave W. S. money to stift him away as soon as he had killed R. T.* Parrants Case. B. R. But I must beg leave to suspect both these Cases; for the words are very scandalous, and I have seen the report of a Case where it is said to be adjudged to lie

for these words, *Thou art a concealer of Felons, and hast shewed such favour to a horse-stealer, that he and the horse is conveyed away, and I can hang thee if I will.* Bondman, vers. Tooker. Pasche 7. Jac. B.R. And I have seen a report that it lieth for these words, *Thou art a concealer of Felonies.* Pendants Case. If I. had consented to C. I.S. had been dispatched out of the way; adjudged to lie for this, as is said, Cardinals Case.

It is said, it lieth for these words, *Thou wast arraigned at Warwick Assizes for stealing a horse, and didst make good friends, or else thou hadst been hanged.* M.8.Car.B.R. And for this, *He was in the Goal at Norwich for robbing one on the Highway.* Sprat and Hains Case.

And yet in *Hob. Rep. pl. 196.* it was agreed not to lie for these words, *Thou wast in Warwick Goal for stealing a horse.* Nor will an Action lie for these words, *Thou hast been indicted for Felony, or thou wast impeached for Felony; or, thou wast arrested, imprisoned, [or in Goal] and arraigned for stealing a horse:* for this may befall an honest innocent man, and these Cases do differ a little from the first Case. *Hob. Rep. pl. 209. 289.* Nay, it is said, that it hath been resolved by two Judges, it will not lie for these words, *Thou hast been in Goal for coining, and hast been burned in the hand for it.* Trin. Jac. B. R. But I cannot receive it without doubting of it.

Innuendo.

It will lie for saying, *Thou didst burn a barn full of Corn.* Co. 4. 14. But it will not lie for saying, *Thou didst burn a barn.* Nor may one say, *Innuendo a Barn full of Corn.* Idem new Book of Entries. f. 25. Adjudge.

It will not lie for saying, *Thou art a breaker of Houses.* M. 9. Jac. Slaughter's Case.

It will lie for saying, *Thou art infected of Robbery lately done.* Dyer 317.

It will lie for saying, *Thou hast stolen my two Cocks [or Hens] or Horse, or any other goods.* Trin. 5. Jac. B.R. Bensers Case. adjudge. So it lieth for this, *Thou didst steal my Horse and wast in Goal for it.* Hob. Rep. pl. 196. So it lieth for saying, *Thou art a steal-gown, and the first Gown that thou didst wear thou didst steal.* Adjudge. New Book of Entries. f. 23.

It

It lieth for saying, *Thou hast robbed the Church of S. and taken away the lead thereof.* Pasche 5. Jac. B.R. But not for saying, *Thou hast robbed the Church,* without more.

It lieth for saying, *He should have been hanged for a Rape, and it cost him dear.* M. 39, 40. Eliz. B.R. Redfords Case.

It hath been thought by some, that it lieth for these words, *Thou didst like of those, who do maintain sedition against the King* Cook 4. 13. See *Quere.*

It lieth for saying, *He hath stolen a horse, and it will be proved by many witnesses.* Adjudge *Hares Case.* But it will not lie for these words, *He hath stolen a Mare;* or *I.S. is forsworn.* adjudge. *Pasche 17. Jac. B.R. Barham's Case.* For this is an uncertain charge.

It will not lie for these words, *It is in my power to hang thee.* 17. Jac. B.R. *Pridham's Case.* Nor for these words, *Thou hast deserved hanging.* Mich. 4. Jac. B.R. and *Pasche 38. Eliz. Hollands Case.*

This Action will lie for these words, *There is not a Purse cut within twenty miles, but I.S. knows of it, and hath a share in it.* *Balls Case.* And yet the contrary is said to be adjudged.

It lieth for these words, *I was robbed, and thou wast privy to it, and hadst part of the money.* Adjudge 38. Eliz. Redfords Case. And it is said to be resolved, to lie for these words, *A. hath half my goods and shall be hanged for it.* 8. Jac. B.R. *Long and Kings Case.* But this I cannot receive for Law: For it is said to be adjudged that it will not lie for these words, *I. had forty pounds worth of Plate, and A. hath it, and will be hanged for it.* Trin. 12. Jac. *Kings Case.* Nor will it lie for these words, *I.S. was robbed of 20. l. and A. had it, and will be hanged for it by two Judges.* Pasche 9. Jac. Foard, vers. King. Nor will it lie for these words, *I. was robbed, and A. received part of the goods stolen, and I. could hang him for it.* *Newlins Case.* Pas. 7. Jac. And yet all these words import a more certain and foul slander than the first words do, *I. heard it spoken that I.S. was one of them that was at Purnels Robbery, and that four of them went to his house the next morning.* adjudged to lie. 40, 41. Eliz. C.B. *Reads Case;* yet some doubt of this.

It.

It is said to be agreed, that an Action will lie for these words, *A. did set on me, and took my purse from me*, (not saying) *in the high way*. And for this, *Thou didst set on me in the high way, and tookest my purse from me.* adjudg. *Stoners Case. M. 10. Jac. B. R.* And for this, *Thou didst meet me on the high-way and askedst my purse, and I gave thee five shillings for fear.* *Bonds Case.* And yet it is said to be resolved not to lie for these words, *Thou tookest away my purse in the high way, and I will swear it. Quare.* For I see little or no difference between this and the last Case; the words carry as bad a report as the former words do. But it seems to be agreed that no Action will lie for these words, *Thou didst take away my money*; nor for these words, *Thou didst beat me and take away my money*; nor for this, *Thou didst take away my money with a strong hand*; or, *Thou didst take away my purse, and twenty shillings in it.* *Hob. Rep. pl. 268. Adjudg. Mich. 36, 37. Eliz. Coo. B. Lynes Case.* It will lie for saying, *He hath robbed I. S.* notwithstanding *I. S.* were never robbed. *per Cur. M. 9. Jac. B. R.*

It is said to be adjudged not to lie for these words, *I have an Action against I. S. who hath stollen by the high-way side.* *Demizens Case. 36, 37. Eliz. B. R.* This seems to me somewhat a hard Case; and yet *Hob. Rep. pl. 382.* hath a Case somewhat like, *I have matter enough against him, for I. S. hath found forgery against him, and can prove it.* The reason seems to be taken from the manner, not the matter of the speech.

It is said also, it will not lie for saying, *Thou art a Cut-purse.* *Trin. 17. Jac. B. R.* for he may be a Glover: So that it will not lie for these words, *Thou art a cunning Cut-purse Knave*; and this is said to be adjudged. *Trevillians Case, B. R.* These Cases seem hard to me; for the common and necessary intendment of the words is in the worst sense. And to call a man *Cut-purse* (me thinks) is actionable. And it is said to lie for this, *Thou didst pick five shillings out of my pocket.* adjudg. *Drumers Case.* So it will not lie for saying, *Thou art a Coyner of money*; or, *hast coyned money.* *Trin. 17. Jac. B. R.* for it may be his Trade. Nor for these words, *Thou getst money every day by coyning Gold.* *M. 19. Jac. B. R. Burnels Case.*

It will not lie for saying, *Thou art a priggging, pilfering fellow,*

low, and hast pilfered away my goods from my wife and children, adjudg. Carters Calc. M. 37, 38. Eliz. B. R. Nor for this, Thou art a filching fellow, and hast filched away ten pounds from me. adjudg. Hob. Rep. pl. 323. Nor will it lie for saying, Thou art a healer of Felons, or, Thou hast strained my Mare; without a special Averment, that it hath such a meaning in the place, that it doth import a scandal.

Averment.

It will lie for these words, *Whoever is a false Thief in Gloucestershire, I. S. is falser then he.* But in this Case, there must be an Averment that there is a false Thief there. *Hazlewoods Case. Aver. M. 2. Jac. B. R. But it lieth not for these words, I can finde in the Parish a falsen Knave then B. who was indicted for Felony; and this Knave is I. S. in Hazlewoods Case.*

It will not lie for saying, *Thou art a seditious Knave, or a thurvisse Knave, or a trayterous Knave. Co. 4. 19. And yet it hath been said, it was agreed to lie for calling one trayterous Knave. Hil. 32. Q. Ward and Thorns Case. But it will not lie for saying, Thou art a rebellious Knave, for this may be upon a Writ of Rebellion in the Chancery.*

This Action will not lie for saying, *Thou maintainest a rebellious Knave, or [rebellious persons.] Nor for this, Thou art a maintainer of Thieves abroad and at home, and dost maintain I. S. in such a Castle. And yet it is said, it doth lie for these words, Thou art a maintainer of Thieves in thy house. And clearly to say, Thou maintainest Thieves in thy house to rob thy Neighbors. And yet it will not lie for saying, Thou keepest none but Thieves, [or Cutpurses] in thy house, and hast their goods. M. 17. Jac. B. R. Nor will it lie for this, Thou art a favourer of Thieves. Dyer 75. Nor for this, Thou keepest men which rob on the high way [or which, rob me] for all this may be unawares. Nor as it seems for this, Thou keepest men with intent to rob me. But it will lie for these words, Thou harborest, and maintainest Traytors, condest them out of the Realm, and maintainest them with money there. Pasche 29. Eliz. So it seems it will lie for this, Thou hast been a setter of Thieves to rob me, or hast hired me to rob me; if I be robbed, this is Actionable. Hil. 13. Jac. B. R. So to say, Thou hast received Thieves, knowing them to be so. Matthews Case. But to say, Thou art a receiver of Thieves, contra.*

This Action will lie for these words, *Thou hast houlstred* [or received] *goods that were stolen, knowing them to be stolen*; but unless it be added, *ex scientia*, it seems they are not Actionable. *M. 17. Car. B. R. Haws Case.* adjudg. But if the manner of receipt spoken of, were such as is not Felony, the Defendant must shew how it was for the clearing of himself. *March. fol. 16.* And yet if one say, *I. S. hath stolen a horse, and his son is consenting to it*; it seems the son cannot have this Action for these words. *Trin. 14. Jac. Lewknors Case.*

It hath been said, It will not lie for saying, *Thou hast stolen away my corn*; because it doth not appear whether the Corn were severed. *Trin. 37. Eliz.* And yet divers Judgements are recorded to be to the contrary, as this *Hil 14. B. R.* for saying, *Thou didst steal my corn and carry it into the Market.* *Glovers Case.* *Pasche 7. Jac. B. R.* and *Pasche 40. Eliz. Cook B.* *Thou art a false Knave and didst steal my corn.* *Harris Case.* *Thou art a Corn-stealer.* *39. Eliz. Cook B.* For saying, *Thou art a thief and hast stolen my Corn.* adjudg. *Kelham and Mandes Case.* *B. R. 2. Jac.* Also it is said to be adjudged to lie for this, *He hath stolen my wood.* *5. Jac. B. R. Litchfields Case.* *Trin. 18. Car. B. R.* And for this, *He hath feloniously taken my wood.* *Pasche 38. Elizab. Cook B.* For this must be understood, of Wood cut. But if he say, *He hath stolen my Tree, or my Trees,* contra; *Arbor dum crescit, lignum dum esecere nascit.* *Trin. 4. Jac. B. R. Rot. 1366.* accord. But it seems all these Judgements are not approved by the Court of Common Pleas; For there it hath been oft agreed that this Action will not lie for saying, *Thou art a Thief, for* [or, and] *thou hast stolen my Trees, or Apples out of my ground; or Corn out of my Field; or an Acre of my Corn; or twenty load of my Furzes.* *Hob. Rep. pl. 106. pl. 97, 98. 472. 406.* Nor for this, *Thou hast robbed my Hop-ground, or, stolen my Apples out of my Orchard,* [or,] and it will be proved by *stealing of my Apples in my Orchard.* *Coo. 4. 19.* So it will not lie for these words, *Thou art a Thief, for thou tookest away my Cattel upon an Execution, and I will hang thee.* *Mich. 7. Jac. Wilks Case.* And yet some do put a difference between [and] and [for,] and say that for this, *Thou*

Thou art a Thief, and hast stolen my Trees or Apples, &c. it shall lie. But all agree, that it lieth not for these words, *Thou art a Thief, for thou hast stolen, &c.* It was said, to be adjudged that it will not lie for this, *Thou hast robbed me, and taken away my evidence.*

It is said to be adjudged to lie for these words, *A. is an arrant thief, and he hath stolen my Apple Trees.* *M. 7. Jac. B. R. Eyres Case.* But it was moved in arrest of this Judgement, and in *Mynors Case. M. 4. Jac. B. R.* this difference was agreed there, and it was said, it had been often adjudged there accordingly: And it seems that Court is of this Opinion still. But the Judges of the Court of Common Pleas are utterly against it, and will by no means admit of this difference: And therefore they judge the Action to lie alike in both Cases. *Hob. Rep. pl. 406. 98. 17. 20.* But all agree it will lie without question for saying, *Thou hast stolen my Apples out of my Loft; or, Thou hast stolen the Corn out of my Barn; or, Thou hast stolen my Wood, [or, Furzes] out of my Barton.* *Hob. pl. 258. Hil. 37. Eliz. B. R. Castlemains Case.*

It lieth not for this, *Thou art a Thief, for thou hast cut off the ear-mark of my sheep, and set on thine own.* *29. Eliz. B. R.*

It lieth for saying, *Bear witness, I Arrest you for Felony per curiam.* *M. 17. Jac. B. R. Serley Case.* So for saying, *If I could, finde I. S. I doubt not but within two days to Arrest H. of suspicion of Felony.* Adjudg. *Herls Case. Cook 4. 15.* And it is said, it hath been ruled to lie for these words, *I charge you with felony, and I charge the Constable to take you.* *M. 5. Jac. B. R.* Also it hath been said to be adjudged to lie for these words, *Bring me to the Constables house, for I am robbed, and I will bring him to the house of I. S. to arrest him, for he setteth them to rob me from time to time.* Adjudg. *B. R.* And yet in other places we finde it affirmed and ruled, that it will not lie for saying, *I charge you for Felony, for taking money out of the Pocket of I. S.* Nor for these words, *I arrest you for Felony; or, I charge you with Felony.* *Hob. Rep. pl. 381. 394. 286. 38.* And elsewhere.

And to reconcile these, I take the difference to be this, If I do Arrest a man for a suspicion, and in the Arrest, use

these words when there is cause, this is in the due way of Justice, and not Actionable. But if I use these words without any just cause, or where I do not proceed in a course of Justice, but before or after the arrest, or otherwise speak any of the said words, they are Actionable. *Hob. Rep. pl. 2. 8.*

Sect. 6.
Which
concern a
man in his
Office or
place of
trust.

Judge, Ju-
stice.

IT is said, that this Action will lie for any Officer, against him that shall say, *He hath no skill in his office.* But for a manual Tradesman, it will not lie for these words, *He hath no skill in his Trade.* See *Quere* of this last, *Hil. 16. Jac. B. R.* It will lie for saying to any Officer, *You are an Extortioner;* or, *you have extorted twenty shillings above your due Fees.* *Cook 10. 61.*

It will lie for saying to a Judge or Justice of Peace, *You are a corrupt man,* [or *Judge*] or *Justice of Peace*: Or, *You deal corruptly,* or, *you take Bribes,* or, *you do not minister true Justice,* or, *you are a false Judge,* or, *a false Justice of Peace.* *Coo. 4. 16. Brod. 11. 2.* But it will not lie for these words, *If any man will give him bribes, Sheep or Capons, he will take them,* ad judg. *Paſche 35. Eliz. B. R. Sir Chr. Helliards Case.*

It will lie for saying to a Judge or Justice of Peace, *You are an Ambodexter,* or, *you take money on both sides.* *M. 2. Jac. B. R. Dawneys Case.* Or, *You cover* [or *hide*] *Felonies.* *Dyer 72. and Stuckleys Case. B. 7. Jac. B. R.* Or, *You are a common Barreter;* or, *you are a common Champertor,* or, *you are a common main- tainer of Suits.* *Hob. pl. 188. 145.* So for saying, *You took money of a Felon brought before you, to let him escape.* *Paſch. 37. Eliz. B. R. Rot. 147. Adjudg. Cottens Case. And Trin. 36. Eliz. Staffords Case. B. R.*

It lieth for saying, *I was like to be killed at his house, he inticed me into his Stable to see his horses, and there he instigated I. S. to beat me.* *M. 2. Jac. B. R.*

It doth lie for saying of a Justice of Peace, *He hath done me wrong in returning the Recognisance for I. S. in 20. l. whereas it was taken but for 10. l.* *Paſche 4. Jac. B. R.*

Some think it will lie for these words, *He can bear but with one ear.* *Chornleys Case.* And for these words, *He doth maintain the worst people against Gods Law.* *35. Eliz. Butlers Case. Adjudged.*

It will not lie for saying to a Justice of Peace, or Judge, speaking of the Tenants of his Mannors, and his taking of Fines, *When your Tenant took his Land, you cozened him of his fine, and dealt corruptly, and I will make you appear where you dare not shew your face for your base dealing.* Trin. 4. Jac. And if the discourse be about health, and one say, *He is a corrupt man.* M. 7. Jac. Coo. B. So if the talk be about his Estate, and one says, *He is a Bankrupt:* Or, if the discourse be about his Utiury, or his fraud in an Executorship, and thereupon one saith, *He is a corrupt man, or a false man, or the like;* and therefore in such like Cases, if the Plaintiff set forth part of the words only, it will concern the Defendant to set forth the whole matter in avoidance of the Suit. Cook 4. 14. And yet if the words be spoken indefinitely, without any such reference, as in the Cases before, they will be Actionable. *Sermo relativus ad personam intelligi debet de conditione persone.* Hob. Rep. pl. 351.

It will not lie for saying to a Justice of Peace, *You are an Usurer, or you have not dealt honestly about a will.* Cook 4. 16. *New Book of Entries.* fol. 12. Not for saying, *He hath gotten all he hath by swearing and forswearing.* adjudg. N. B. of Entries, f. 21.

This Action will lie for speaking these words to a Preacher, Preacher. *You have made a seditious Sermon, and moved the people to sedition.* Cook 4. 19. and *Philips Case.* Pasche 24. Eliz. B. R. But it will not lie for saying to him, *Thou art an Adulterer;* or, *Thou hast had two children by I. S. and I will cause thee to be deprived for it.* Adjudged. *Parrets Case.* M. 38, 39. Eliz.

It will lie for saying to a Sheriff, or any such like Officer, Sheriff. *Thou art an Extortioner, or, Thou hast by colour of thy Office extorted 20 s. above thy due Fees.* Cook 10. 61. and *Stanleys Case.* Pasche 14. Jac. Cook B. and *Jones Case.* 38, 39. Eliz.

It lieth for saying to a Serjeant, or Barrester, *You are a dis- Lawyer, honest man in your profession, or, you have witness many men* adjudg. Trin. 37. Eliz. Or, *You did disclose my Counsell to my Adversary, or, you are a cozening Knave, and shew'd a counterfeit [or forged] Deed, knowing it to be so.* M. 39. 40. Eliz. M. 20. Jac. Curia. But it will not lie for saying, *You shew'd in*

counterfeit [or *forged*] Deed, without more. It will lie for saying, *He giveth bad Counsell*, or, *he is no Lawyer*, or, *he is an ignorant man in the Law*, or, *he hath no skill in the Law*. M. 8. Car. B. R. in *Cawdreys* Case. Also it lieth for this, *He is the simplest Lawyer towards the Law*. Adjudg. 39, 40. Eliz. B. R. Or, *He hath no more Law then an Ape*: But to say, *He hath as much Law as an Ape*, is not Actionable. And ye: it will not lie for these words, *He is no Scholar*: or, *Thou wast never any Scholar* (or to speak to a Scholar) *He hath no learning*, or *he is an ignorant man*, in general, without reference to his Office. Nor will it lie for saying, *Thou art a drunken fellow*, or *thou art an Ass*. In *Cawdreys* Case. It will lie for saying to him these words, *Thou a Barrester! a Barrester! thou wast put from the Bar*. Adjudg. Pasch. 8. Jac. Cook B. *Bestlies* Case. So it will lie for these words, *Thou a Counsellor! thou art a concealer of the Law*. Adjudg. Trin. 2. Jac. B. R. *Coxes* Case. It will lie for saying to a Barrester, *You are a bribing Knave*, or *you are a corrupt man*, or *you are a common Barreter*, or *you are a common Champertor*, or *you are a common maintainer of suits*. Hob. Rep. pl. 188. 145. pl. 17. Cook 4. 16. It lieth for saying, *He hath the Falling-sickness*, by *Tanfield Justice*. Hil. 4. Jac. B. R. So it will lie for these words, *He was of my Counsel*, and revealed the secrets of my cause. *Snags* Case. Trin. 13. Q. B. R. New book of Entries, fol. 22. And yet it seems it will not lie for this, *Go to him, he will deceive you*. Adjudged.

It will not lie for these words, *Thou hast nothing but what thou hast gotten by swearing and forswearing*. New Book of Entries, f. 22.

Attorney. It will lie for saying of an Attorney, *He is an Extortioner*. Hil. 49. Eliz. Cook, B. *Stanleys* Case; or *he is a bribing Knave*. Cook 4. 16. Hob. Rep. pl. 17. Adjudg. or *he is a corrupt man*, and doth deal corruptly. Cook 4. 15. or *his credit is fallen*, he dealeth on both sides. M. 42, 43. Eliz. Cook B. *Kings* Case; or *he is an Ambodexter*, or *he taketh money on both sides* [or on both hands] in Suits. M. 3. Jac. *Danreys* Case, B. R. But it will not lie for saying of him, *He is a common maintainer of Suits*. Hob. Rep. pl. 45. It lieth for saying of him, *He is a false practiser*

practiser, per. 3. Justices, Pasch. 17. Jac. Moors Case; or he is a cozening Knave, or he is a Knave. Adjudg. Yardlies. Case. 18. Eliz. B.R. And yet, Forging Knave, hath been doubted. Pasch. 17. Jac. B. R. Moores Case. I know not upon what reason. And it is said it will not lie for these words, *Thou art a false cozening Knave, and hast cozened my two kinsmen of their Land, and deservest the Pillory.* 26. Eliz. B.R. nor for saying, *He cozened I. S. out of his Land.* Adjudg. It lieth for saying, *You are a dishonest man in your profession.* It lieth for saying, *Thou art a common Barrester.* Hob. Rep. pl. 188. or *thou art a common Champertor.* Hob. Rep. pl. 183. 145. 351. or *thou art a Champertor.* Boxes Case. M. 14. Jac. Cook B. or *thou art the simplest [or foolishest] Attorney towards the Law.* M. 39. 40. Eliz. Cook B. Martins Case. Adjudg. or *thou hast no skill in thy office.* But it will not lie for saying, *Thou hast no skill in Husbandry,* or the like, this is not actionable. It will lie for these words, *Thou didst disclose thy Clients counsell to his adversary.* Trin. 17. Car. Cook. B. Sandersons Case; or *thou art a suborning Knave,* or *thou art an extorting Knave,* and didst suborn one to be sworn before the Lord Chief Justice. 20. Jac. If a suit be between R. and B. and B. say to R. I. S. *your Attorney is a bribing Knave, and hath twenty pound of you to cozen me,* this is actionable. adjudg. M. 1. Jac. Cook B. Yardlies Case. But it will not lie for saying to an Attorney, *Thou art a Usurer,* or *thou hast plaid the Knave with me about a Will.* Cook 4. 16. And it is said, it will not lie for this, *My father was not pecked over the bar as thy father was.* Trin. 41. Q. Cook B. And yet it is said, it will lie for saying, *Thou wast pecked over the Bar.* Quere what difference. Nor will it lie for this, *He was or will be pecked over the Bar.* Trin. 41. Eliz. Knightlises Case. Cook B. Hob. Rep. pl. 145. Nor for this, *I think thou art an Attorneys Clarke, and if thou be, I shall have thee pecked over the Bar the next Term.* Hob. Rep. pl. 159. Pasch 7. Jac. Cook B. Tratmans Case; for these words are of an uncertain sense. It is said, it will not lie for saying of him, *He gets his living by false Writs.* Adjudg. B.R. nor if one speak of going to him, or another say, *Go not to him, for he will cozen [or deceive] you.* Pasch. 18. Jac. Ratcliffs Case.

- Receiver.** It lieth for saying of the Receiver of the Court of Wards, *Mr. Receiver hath cozened the King, and dealt falsely with him.* Trin. 17. Jac. Sir Miles Fleetwoods Case. Hob. Rep. pt. 351.
- Auditor.** So to call an Auditor of the Court of Wards *Frauditor*, is actionable in Sir Miles Fleetwoods Case.
- Constable** It lieth for saying to a Constable, *Thou hidest, or coverest Felonies, or favourrest Felons.* Stucklies Case. Pasche 7. Jac. B. R. and Bondmans Case.
- Physitian.** It lieth for saying of a Physitian, *He hath no learning or skill in Physick.* M. 8. Car. B. R. in Cawdreys Case. And yet to say, *He is an Ass, or hath no learning, or is no Scholar* in general, it seems is not actionable. But it will lie to say of a Doctor of Physick, *He is a Mountebank, an Emperick, and a base fellow.* adjudg. Pasch. 12. Car. B. R.
- Mayor.** It lieth not for saying to a Mayor, *Thou hast cozened all thy brethren.* 8. Car. B. R. Mayor of Tivertons Case, for the words are too general and incertain to uphold an Action.
- Jury man.** It lieth for saying to a common Jury man, *Thou art a common Jury man, and hast seen the overthrow of an hundred men by thy false and subtil means.* Adjudg. P. 7. Jac. Co. B. Peters Case.
- Overseers of the poor.** It is thought it will lie for saying of Overseers of the poor, that *They have cozened the poor of their money.* 9. Jac. B. R. yet this some doubt. But it seems clearly it will lie for saying, *They have cozened the poor of their bread.*
- Commissioner.** It lieth for saying of a Commissioner, *That he hath a Commission to hear and end a difference between A. and B. Thou art a corrupt man, and hast taken bribes of A. to defraud equity and justice.* adjudg. Pasch. 3. Jac. B. R. Sir George Adores Case. So to say of him. *That he put out Depositions taken, and put in some not taken.* adjudg. Hil. 17. Jac. B. R. Sir Nich. Parkers Case. So for saying, *He hath returned depositions that were not taken.* 40. 41. Eliz. B. R. Fishes Case; and whether he be nominated by the Court or Parties, it is all one in the Case.
- Arbitrator.** It lieth not for saying of an Arbitrator, *He hath taken bribes, or he is corrupt.* But it will lie for saying to one appointed to be a common weigher in a Market or Fair, that did weigh Corn between us, *He hath taken bribes to make false weights.*
- Weigher of Corn.**
- Steward.** It lieth for saying of a Steward in a Leet, *He hath added a present-*

presentment, which the Jury never made, M. 4. Jac. B. R. Carr's Case, especially if he keep many Courts;

It will not lie for a Bayliff that had the selling of his masters Bayliff.
Corn for three years, for saying, *Thou art a cozening Knave, and hast cozened thy master in selling by false measure, Hob. pl. 93.* But if he did continue in his office, and these words did make his master put him away, *contra.*

It will not lie for saying of a Scrivener, that *He made false writings.* Scrivener

It lieth for saying of a Mathematical Measurer or Surveyor Measurer
that is learned, and doth it by Art, or any such Officer, *He hath no skill in his Trade, or he is a cheater or cozenner in his Trade.* But to say so of one that doth measure by the poll onely, *contra.* Hill, 16. Jac. B. R. London's Case.

Out of all this it appeareth, that whereever this action is maintainable for any defamation in a mans Office, the words must be spoken either generally, without any reference, and so may be referred to his office, or with reference to his office; for if they be spoken of any other subject then his office, they will not be actionable. *Agree, 16. Jac. B. R. in London's Case.* And the party that lues for the slander, must shew in his Declaration, that he was such an officer at the time of the words spoken, otherwise the action is not maintainable. But he need not shew that the hearers did know him to be such an officer, *Hob. Rep. pl. 104. 93. 351.* yet if the words be ambiguous, but there is a pregnant violence in them to lead the hearers and Court to take them in the worst sense, they must be taken so. As in the Case of Sir Miles Fleetwood. *Hob. Rep. pl. 35.*

IT lieth upon this ground also against them that slander a Sect. 6.
Lawyer or an Attorney with *ignorance or unfaithfulness,* in Which
the Cases before set down. concern a

It will lie for saying to a Vltualler or Inn-holder, *He hath the pox, or any other infectious disease in his house:* if he lose his guests thereby, *non aliter.* Cook 4. 17. Trin. 9. Jac. Ladlams Case. So for saying, *He keeps a House of common Bawdry.* he gets his living.
Curia Hil. 4 Jac. B. R. Thorns Case. M. 39. & 40. Eliz.

And for this it seems it will lie without that consequence, and without Averment thereof. So this action will lie for saying of any Tradesman that gets his living by buying and selling, or did so of late, and hath given it over a little while, as a Merchant, Shoemaker, Mercer, or the like Tradesman that useth buying and selling, *He is a Bankrupt, and I will drive him out of the Countrey for a Bankrupt.* *M.9. Jac. B.R. Dyer's Case.* Adjudg. or he will be a Bankrupt very shortly. *Cook 4. 19. Dyer 72. Long's Case. M.7. Jac. Cook B. Seelys Case. Pasche 12. Jac. B.R. or he is a Bankrupt, and fled beyond the Sea for money. Trin.9. Jac. B.R. Trulocks Case; or, I will prove that he hath been a Bankrupt, and hath agreed with his Creditors for five shillings a pound. Edmunds Case. Hill.13. Jac. B.R. Rot.855. Or he is broken. Hill.17. Jac. B.R. Johnsons Case.* But it will not lie for saying, *I will sue out a Commission of Bankrupts against I.S.* Nor will it lie for calling a Gentleman, or one that is no Tradesman Bankrupt. *Finchesley 186.* Nor for saying to a Tradesman, *Thou art a branded Rogue, and a Rogue by the Statute.* *M.19. Jac. B.R. Harrison's Case;* unless he can aver any special loss by it. Nor will it lie for these words of a Merchant, *Doth he owe you money? get it quickly, and take heed how you trust him.* *Trin.36. Eliz. Paschys Case.* Nor for this, *He is a false knave, and keepeth a false debt Book, for he chargeth me unjustly with what I never received.* Adjudged. *Hill.37. Eliz. B.R. Bracks Case.* Nor for saying, *He is a cozening Knave.* *Pasch 15. Car. B.R.* And yet in these two last Cases, if the speeches be with reference to his Trade, *Quere.* It will not lie to say of a Tradesman, *He is not worth a groat;* nor nor albeit he aver that in the Countrey it means that he is a Bankrupt. *Pasch 15. Car. B.R. Axes Case,* for his Credit may be good, and he not worth a groat.

It will lie for saying to a Goldsmith, *Thou art a cozening knave, for thou hast sold me a Saphir for a Diamond.* *H.32. Eliz. B.R.* But if one say to a Taylor, *Thou art a cozening Knave, because thou hast sold me a chain for gold, where it is half Copper, and thou art a cozening Knave upon record, and hast been imprisoned for cozening:* No Action will lie for these words. *32. Eliz. B.R.*

It doth not lie to say of a Carrier, *He is a common Barrater.* Hob. Rep. pl. 283, 288.

It lieth for saying of a Journeyman Shoemaker, *Do not meddle with him, for he will undo you, or he will put you out of doors,* with an Averment that this word doth intend in the Countrey undo. Pasch 15. Car. B. R. It lieth for saying of a servant, *He doth defraud, cozen or cheat his master, or will undo him,* if by this he have any special damage; otherwise not.

It lieth for saying of a Brewer, *He sells naughty Beer.* M. 15. Car. B. R. or, *my Mare doth piss as good Beer as he doth Brew,* if he can aver a loss by the words, Dykes Case.

It lieth for saying to a Braiser, *Thou didst cozen I. S. in a brass pot,* adjudg. Pasch 7. Jac. B. R. So by the same reason to say to any Tradesman, *He did cheat a man in Trading.* So to say of a Farmer, Badger, or of any man that sells by weight and measure, *He sells by false weights and measures, or he did keep false measures, by which he did cozen the Countrey.* But it lieth not for saying, *He had [or he kept] false weights or measures in his house.* Hob. pl. 93. Pasch Cook B. 17. Car. Paynes Case. But to say this of a Bayliff that sold his Masters Corn for a while, and hath given over, it seems it will not lie.

To say of a woman Inn-keeper, *She is a pocky unwholsome woman, doth wear a skarfe to hide her blanches in her neck,* it is a pocky household, may happily bear an Action. M. 9. Jac. Ludmans Case.

Out of all which it is to be observed, that where ever this Action lieth for a slander to a man in his Trade, the words must be spoken either generally, and so may be referred to it, or must be relative words, as *Bankrupt*, or the like, or with express reference to it; for if they be spoken of any other thing they will not bear an action: And the party that sues, must set forth in his Declaration, that he was such a Tradesman in particular; and it is not enough to say, he got his living by buying and selling, but he must say, he is a Merchant, Mercer, or the like, and that he was so a little before or at the time of the words spoken, else no Action will lie. Hil. 7. Car. B. R. Collins Case. Adjudg. M. 17. Car. Cook B. But if the count be, that he have been of that Trade for twenty years last

past, and lay the words to be spoken within that time; it is good. But if he say, that he hath been of that Trade for divers years last past, *contra. Hil. 17. Jac. B. R. Johnsons Case. Hob. Rep. pl. 106. 93.*

Averment.

In all these Cases there must be a special Averment of some loss by the words spoken. *Pasche 15. Car. B. R. Axes Case.* But others upon better reason and authority hold the contrary. But all agree it to be best to alledge some special damage if the Case will bear it. *March F. 96.*

Sect. 7.
Which
tend to a
mans dis-
inheri-
tance.

It lieth for saying of a lawful Heir to land before or after his fathers death, *He is a Bastard.* And this will lie though the words were spoken before or after he hath the land in possession, and though he be not about to sell the Land, and though he have no loss by the speaking of the words; *Cook 4. 17. M. 20. Jac. B. R. Elborrows Case*; for by this the Title of his Land may be called in question. But if the party speaking claim as next heir to the Land, he may justifie it, and it will not bear an action. *Trin. 25. Eliz. B. R. Banisters Case. Cook idem.* And if the plaintiff omit this, the Defendant may set it forth by way of bar. To say a man is his villain; will not bear action now as it seems, because villenage is gone.

Sect. 8.
Which
charge a
man with
an infecti-
ous dis-
ease.

It lieth for this, *He hath the French pox, or is infected with the French pox, or is laid with the Pox, or the Pox doth haunt him twice a year.* *Cook 4. 17. and Ludlams Case. M. 2. Jac. per Fenner and Williams Justices.* So, *Thou hast caught the French Pox, and carryed it to thy wife.* *Hob. Rep. pl. 290.* So for saying; *Thou art a pockie whore, and the Pox hath eaten out the bottom of thy belly, that thy guts are ready to fall out.* *Mich. 7. Jac. Cook B. Miles Case. Trin. 15. Jac. B. R. Milwards Case.* So it seems it will lie for saying; *Thou hast the great Pox.* *20. Jac. B. R. or the plague.* So it lieth for saying; *Thou art a leprous knave, not fit for company, or thou art a leper.* *Trin. 4. Jac. B. R. Rot. 1051.* But it will not lie for saying; *One hath the Falling sickness.* *Hil. 4. Jac. B. R. on the Pox.* *Cook 4. 17.* Nor for this; *Hang him, he is full of the Pox.* *Cook 4. 17.* It will not lie for saying; *Thou art a Pockywhore.*

44.45. *Eliz.* Adjudg. *Curia. M.7. Jac.* Cook B. Nor will it lie for this, *That pockie drab doth wear a Skarf about her neck to hide her blanches, I will not eat with her for ten pounds;* by three Judges. *Trim.9. Jac.* Ludmans Case. Nor for this, *Thou hast lien in fullers Tub.* Chappels Case. Nor will it lie for these words with this Averment, *That none do lie there but such as have the French Pox.* Adjudg. *M.44. & 45. Eliz.* Boddin and Jones Case. Nor for this, *Thou art a pockie drab, dost wear a Skarf about thy neck to hide thy blanches; you are a pockie household, and I will not eat with you for twenty Nobles.* And yet if they were speaking of the French Pox, and the party speak these words, it is dangerous. *M.9. Jac.*

IF I have Land, and have need, and am about to sell it, and another say, *It is his Land, and I have no right to it, or I have no Title to it, or I have no good Estate of it, or that I can make no good estate of it;* and hereby my Chapitan doth defist and fall off, I may have this Action: And albeit he or some other have a colourable estate, yet if he have not a good Title in Law to it, this will bear an Action. *Cook 4.18. New B. of Entries. 28.* As if two have Leases of the same Land, and he hath the latter which is not good; and he say, *The Land is his, and the others estate is not good;* this is Actionable. *Mildmayes Case. Adjudg. 6. Eliz. Cook B. Cook 1.177.*

If I be about to sell my Land, and another saith, *I know one that hath a Lease of the Land, and he will not part from it at any rate;* this is actionable. Adjudg. *M. 37,38. Eliz. B.R. Pennymans Case. M. 20. Jac. B.R. Elborrows Case.* The Plaintiff set forth he had much Land by Inheritance, and the Defendant intending to impeach his Title, said, *His wife shall not set above mine, for her husband is a Bastard, Innuendo* to the Plaintiff. It was adjudged to lie without any Averment. So it will lie for saying, *your Father is a Bastard.* 6. *Eliz. Cook B.* So, *thou art an Alien.* 15. *Jac. B.R.* Adjudg. And yet in case, Where I claim an estate, if I say so, *that I have a title, and the title of the other is not good;* these words may be justified, and are not actionable. *Cook 4.18.* But there must be a special Averment of some loss, and therefore he must shew that he was the

Sect. 9.
Which
flander a
mans title
of his
Land.

Heir, and the other intending to impeach his title, or that there was a communication for a sale; for some hold that if there were only an intent of sale in the Owner, and no progress, no Action will lie for the slander of the Title. *Cook, New book of Entries*, fol. 35. M. 18. Jac. *Sleeds Case*. Yet some Judges have held it will lie without any Averment; for it may cause the King or Lord to search for the Title, and bring a loss in time to come.

Se^{ct.} 10.
Which
tend to
hinder a
mans pre-
ferment.

IF a woman be like to have a husband, or a man a wife, and one say of him, or her, *He [or she] had a bastard, or she is incontinent, or lay with I.S. or I.S. had the use of her body*; and he or she lose their match thereby; this Action will lie for this slander. *Cook* 4. 16. Hil. 4. Jac. B. R. *Dame Harisons Case*. M. 8. Car. B. R. So if a Widdower be like to have a Maid, or Widow, and one say to her, *I wonder you will have him, for he was like to starve his last wife, and would not allow her necessities*; and by this he lose her. Adjudged.

If a Divine be to be presented to a Benefice, and one say of him, *He is an Heretick, or a Bastard, or excommunicate*; and hereby he lose his preferment, he may have this Action for this slander. *Cook* 4. 16.

If a Lawyer stand for an Office, as for a Stewardship, or the like, and bring in speech about him, one saith to another, *He is an ignorant man, unfit for this place*; and thereby he loseth the place, this Action lieth for this slander. *Sanderfons Case*. 17. Car. *Cook* B. And so by the same reason, if any common servant be like to have a service, and by some slanderous speeches he loseth his service, it seems he may have this action for his relief. *Agreed*. M. 15. Car. B. R. But in all these Cases, there must be a special Averment of the loss of the preferment; otherwise the Action is not maintainable.

Aver-
ment.

Se^{ct.} 11.
Which
doth tend
to the
hurt of a
man in his
Liberty, or to bring any corporal, or money punishment on a man.

IFind in the Judgements and Opinions of men upon this point, very great contradiction also, and so much difficulty and uncertainty in the Law in these Cases, that it is hard to give you any Rules on which you may rely herein.

Some

Some say an action will lie for any words which may induce any corporal or pecuniary punishment; Others the contrary. We shall say this only in the slanders within this degree, and the next that follow, it is good to observe how the words do sound, and what the thing said, if true, would produce. For if the words do sound scandalous, or if the thing charged were true, or it would bring any sharp punishment, especially to the body, there (for the most part) the words will bear Action; we say (for the most part) for it is not always so. But on the other side, if the words do not sound foul, as to say, *You built a Cottage, did strike in the Church*, or the like, or the punishment of the thing charged would be but light, *As to be bound to the good behavior*, or the like, or none at all; there (for the most part) it will not lie: And yet in this Case also sometimes it will lie. *Cook 4. 17. Kitob. 173. Cook 4. 19. Dyer 285. 37.* But if any special loss happen to the Party, by the speaking of the words there, though the words in themselves be not actionable, yet they may be actionable in respect of the loss. *M. 17. Car. B. R.* As if one had said, *Thou speakest against the Book of Common-Prayer*, and thereby he was vexed in the Spiritual Court. *Cook 4. 17.*

It is held somewhat confidently, the action will lie in all the Cases, and for any of the words following, (*viz.*) *Thou hast bewitched my Cattel [my milk] my beer, or any of my goods.* *M. 18. Jac. B. R. Sturdens Case.* But it will not lie for saying, *Thou hast bewitched my Wear, that I can catch no fish.* It lieth for saying, *Thou hast a bastard.* *Cook 4. 17.* So for saying, *Thou didst steal six pence.* *Hob. Rep. pl. 258.* So for saying, *Thou didst hire one [or send one] to my house to kill me.* *Trin. 33. Eliz. B. R. Suttons Case. adjudg. Or, Thou didst lie in wait to kill [or to rob] me.* *Pasch 5. Jac. B. R.* Or, *Thou soughtest the life of I. S. if he be dead.* *adjudg. Mich. Jac. 7. Weblins Case.* So for saying of a woman, *She is a bawdy and a whore, and keepeth a house of Bawdry.* *Dame Barlits Case. Trin. 38. Eliz. B. R. and Morgans Case. Trin. 16. Car. B. R. Adjudg. and many others.*

It is said it will lie for this, *Thou didst report money was stolen.* *Finchesley, 185.*

It will lie for any of these speeches, *Thou art a forger of false Deeds [or Writings, or thou hast forged a Feoffment] Bond, Lease, or Release.* Dyer 285. 37. Paich. 39. Eliz. B. R. Wades Case. Or, *Thou a forger of writings.* 39. Eliz. B. R. Goodals Case. Or, *This is a forged Deed made by I. S. under a hedge.* Sir G. Reynels Case. Or, *Thou hast forged the Will of I. S.* adjudg. Paich 7. Car. B. R. Mackenists Case. Or, *Thou hast sued out a Writ against me, and got a counterfeit warrant of thine own making.* adjudg. M. 20. Jac. B. R. Stones Case. Or, *Thou camest with a counterfeit Commission, when he had a good Commission.* Yorks Case. Or, *Thou hast forged a Record in Abergavein Court.* M. 7. Car. Cook B. adjudg. For this is punishable by the Common-Law, though not by the Statute.

It is held somewhat confidently, that it will not lie in all the Cases, or for any of the words following, *Thou art an Extortioner, or thou art a peace-breaker, common quarreller, suspected to be a common Pilferer, common Rieter, a common Libeller, or thou art a common Champertor, or thou art a common maintainer of Suits, thou art a Recusant, or men cannot have their Cattel go in the Common, but I. S. killeth them with dogs.* Dyer 118. *Thou hast robbed my Orchard, thou hast spoken against the book of Common-Prayer, or thou hast set up an unlawfull Cottage against the Statute, thou hast made a forcible entry into Land, or thou didst strike a man in a Church with a weapon, thou art a forestaller, Regrator, or ingrosser.*

It would have lien, when villenage was here, for saying, *Thou art a villain* to I. S. 2. Ed. 4. 5. It lieth for any of these speeches, *I will prove thee [or I can prove thee] perjured.* M. 7. Jac. B. R. Roberts Case. Or, *Thou wast perjured in the Star Chamber, or, thou wast committed for perjury there.* Cook 4. 19. Hob. Rep. pl. 107. 15. Or, *Thou perjured beast.* adjudg. 18. Jac. B. R. Benjons Case. Or, *Thou art perjured, or wast perjured.* adjudg. M. 25. Eliz. B. R.

It lieth for saying, *Thou art a perjured man.* 25. Eliz. B. R. adjudg. It will not lie for these words, *Thou hast got thy living by swearing and forswearing.* adjudg. M. 9. Jac. B. R. So, *Thou hast taken a false Oath [or, hast forsworn thy self] in the Kings-Bench Court, the Leet of S. or any other Court of Record.*

Record. *Harisons Case. B. R. As, Thou tookest a false Oath in the Bishops Court at Excester, or in the Leet of S. or in the Quarter-Sessions at Gloucester.* 38. Eliz. Adjudg. *Castlemains Case. Co. 4. 15. Hob. Rep. pl. 346. 360.* But the words must import the perjury was committed in a Court of Record, and judicially there. And if the words will not bear, it cannot be strained by an *Innuendo* to it. As if the words be, *Thou wast forsworn*, the Plaintiff cannot make them actionable by an *Innuendo*, in the Quarter-Sessions of S. and in the service of the Court. *Trim. 19. Ja. B. R. and 48. Eliz. B. R.* So it will not lie for saying, *Thou wast forsworn at Horsley Court, Innuendo the Court Leet there*, for it may be the Court Baron there. And yet it is said, The contrary hath been adjudged. So neither will it lie for saying, *Thou wast forsworn in the Kings Bench*, for it may be the Prison so called, not the Court, *M. 42. Eliz.*

It lieth for saying, *Thou hast procured one to commit perjury, or thou art a procurer of perjury,* 25. Eliz. B. R. Or, *thou hast suborned one to come ten miles to be perjured, and given him money to do it. Harris Case. P. 5. Jac. B. R.* But if the words import he did it not, *contra.*

It lieth for charging one sworn in a Court upon a *voyer dire* as well as upon an *Issue* that he was forsworn; for this perjury is punishable by the Common Law. *M. 7. Car. Cawdryes Case.* So it is thought of these words, *You were forsworn in your answer in the Court of Request*; for this is punishable by the Pillory. So it is said it lyeth for this, *He hath delivered an untruth in a materiall thing in the Star-Chamber. Sed Quare.* But not for saying, *He hath delivered an untruth in his answer in the Chancery,* 38. & 39. Eliz. *Browns Case.*

It will lie for saying, *Thou art a forsworn fellow, for by thy false Oath thou hast changed as true a man as thy self.* Adjudg. *Rats Case, and 39. Eliz. Brooks Case.* So for saying, *I. S. is mean sworn*, with an *Averment* that it doth signifie perjured in the place where the words were spoken. Adjudged. B. R.

We have shewed before, That it lieth for saying, *Thou wast forsworn in the Leet at W. or [in Hereford Assizes, or in the Quarter-Sessions at Gloucester,]* and that is out of question. But it is said by some, it will not lie for saying, *Thou wast forsworn at the Leet at W. or at Hereford Assizes, or at the Quarter-Sessions*

Sessions at Gloucester; for it may be in ordinary discourse, and extra-judicially, and a Judgment is cited, *M. 38. 39. Eliz. B. R. Willis Case*, to be given accordingly: Yet I cannot but doubt it, for the vulgar acceptance is alike in both Cases. And there is a Record of a Judgment on this side against the other Judgment, *38. 39. Eliz. Cockins Case*. And *Hil. 1. Jac. B. R.* It was ruled to lie for this, *Thou hast taken a false Oath in the Quarter-Sessions at Gloucester*. If I say to one coming out of a Court where he was sworn, *Thou hast forsworn thy selfe*, it is said to be Actionable. *Harisons Case*. And yet it is said, If I say to a man giving his Oath in a Court, *You are forsworn*, and say not in your testimony in this cause or the like, this is doubted. *M. 7. Car. B. R. Camdneys Case*. This distinction seems to me a very nice one. *Quere bien*. It lieth not for saying, *Thou art a false forsworn man*. *25. Eliz. B. R.*

It is said it lieth not for saying, *Thou art a common swearer, or thou art a common haunter of Ale-houses, or thou art a common fighter, or thou art a Sabbath breaker, or thou art a common whore-monger, or thou art a common whore, or thou art a whore, a whoremaster, or a Bawde, or thou art a Haylor, or thou art a common breaker of the Peace, or a common Asfrager, or thou art an Adulterer, or thou art a Fornicator, or thou didst lie with I. S. or I. S. doth lie with thee, [or use thy body]* *M. 39. Eliz. B. R.* Or thou art a *Quean*, or thou art a *Thievish whore*. Adjudg. *Hil. 17. Jac. B. R.* Nor for this, *Thou art the hackney-whore of I. S. Bodins Case*. Or, *Thou wast rid up and down stairs*. *M. 9. Jac. B. R.* And yet for many of these, one may be bound to the good behaviour, and for others of them punished by Fine, or great penalty. See *March. 2. part. 5*. It lieth for saying to a woman, *She keeps a Bawdy house, or house of Bawdrie*. But it lieth not for saying, *She is a Bawde or Whore*, albeit she be married. And yet in London by a speciall Custome it lieth for these words. *Trin. 17. Car. B. R.*

It lieth not for saying, *Thou art a false forsworn Knave, or thou hast forsworn thy selfe*. *M. 7. Ja. B. R.* Nor for this, *Thou hast but one Manner, or thou hast got it by swearing or forswearing*. *Coo. 4. 15*. Nor for saying, *He was detected for perjury in the Star-Chamber*. *Coo. 4. 16*. Nor for this, *Thou art a perjured Knave*,

Knave, that is to be proved by a stake parting the Land of A. and B. Co. 4. 19. So it in a cause depending betwixt A. and B. in the Kings Bench, certain Affidavits being openly read in the Court, the Defendant saith openly, There is not a word true in them, as I can prove by twenty Witnesses; this is not actionable. Pasch. 15. Car. B. R. Moltons Case.

It lieth not for saying, *I have matter enough against him, for I. S. hath found forgery against him, and can prove it. Adjudg, Hob. Rep. pl. 395. Nor for this, Thou hast forged a writing, Hob. Rep. pl. 3. Nor for this, Thou gettest thy living by false Writs. Adjudg. Nor for saying, Thou hast made a false bond [or a false Deed] Pasch. 39. Eliz. B. R. Nor for this, Thou art a Varlet, and hast suppressed thy brothers will to deceive others of Legacies. Trin. 17. Jac. B. R. Godfreys Case. Nor for this, This is the writing of I. S. he hath forged this warrant. Hob. Rep. pl. 3. for these words in these Cases are too generall and uncertain to bear an Action; So if one say to another, Whereas I. S. had made and sealed to him a Bill for x. li. Thou didst shew me the Bill released, and after sealed, thou didst forge that seal, no Action will lie for this, Hob. Rep. pl. 48. Nor for this, Thou hast made the Great Seal. Nor for this, Thou hast made false Records, and dost verifie them. Adjudged.*

It is very much doubted whether the Action will lie or not lie in all the Cases, or for any of the words following, *Thou art a common Drunkard, a common Rioter; and for this it is yet said it hath been ruled it will lie. M. 8. Car. B. R. Stones Case, Or, Thou art a common night-walker, or thou art a common cuef-dropper, or thou art a common Barrator, or a common Hedge-breaker; for, for these a man may be bound to the good behaviour.*

But most men incline that these words are not Actionable, *Thou art a branded Rogue. M. 19. Jac. B. R. Harisons Case. And yet the better Opinion was, that it will not lie for this, Thou hast bought Titles. Hares Case. Thou hast hired me to rob me, or thou art a setter of Thieves to rob me, or thou keepest men with intent to rob me, or thou keepest men to rob me. Hil. 13. Jac. B. R. But if I be robbed, these are dangerous words. But to say, Thou keepest men which do rob me, or which have robbed me. contra.*

And yet it is held, that for most of these words, in this last rank, if they be spoken in reference to mens Trades, &c. or if any special loss can be averred to come to the party by the speaking of them, that then they may be actionable, *Co. 4. 15. 17. 20. M. 19. Jac. B. R. Harisons Case.*

Sect. 12.
Which
tend to a
mans dis-
grace and
reproach
only.

IT is held somewhat clearly, it will lie for this, If one say to a Lord of a Mannor, *Thou art a conzening Knave, and keepest conzening Courtes to conzen men of their Fines.* 4. Jac. B. R.

It is held somewhat clearly, it will not lie for these words, and in these Cases following, *Thou art a Varlet, or thou art a Rogue, or thou art a Rascall, or thou art of evil name, or thou art a villain, or thou art a slanderer, or thou art a Cheater, or thou art a cheating Knave, or thou art a Pillory Knave, or thou art a conzening Knave, a vermine of the earth, a false brother.* 25. Eliz. B. R. Or, *thou art a false fellow, or thou art a Lier, or thou art a Conspirator, or thou art a Railer, or thou art a sower of discord, or thou art a malefactor, or thou art a Miscreant, or thou art a drunken fellow, or thou art a bastard, or thou art an Heretick, or thou art a Schismatick, or thou art an Hypocrite of the Church, or thou didst famish thy last wife with thy wretchedness, or thou art an Extortioner.* It will not lie for saying, *Thou art a conzening Knave, and hast conzened me of 100. l. and I will make thee stand on the Pillory for it.* Adjudg. 30. Eliz. B. R. Nor for this, (unless it be of a Goldsmith) *I will prove thee a Conzenier, for selling me a Saphir for a Diamond.* Nor for this, *Thou gettest thy living by conzening, or thou hast conzened I. Sin buying Saddles for him.* Pasch. 27. Car. B. R. Nor for this, *Thou hast conzened me and all my kindred.* 18. Eliz. B. R. Nor for this, *Thou art a false Knave, and hast conzened me and my two kinsmen.* Adjudg. 26. Eliz. B. R. Nor for this, *Thou hast conzened all the Town of Coventry.* Adjudg.

It will not lie for saying, *Thou art a hornesby, and a Cuckoldly Knave.* Trin. 9. Jac. Palmers Case. Nor for this, *Thou hast conzened the Earl of Hartford of as much as thou art worth.* Trin. 9. Jac. B. R. Tucks Case. curia.

It is very doubtfull whether it will, or will not lie in these following Cases, *Thou didst hold up thy hand at the Bar, or thou*

thou hast deserved hanging. M. 4. Jac. B. R. *It is in my power to hang thee.* Jac. B. R. *Thou didst deserve hanging.* Trin. 16. Car. B. R. *Or thou deservedst the Pillory, or hast deserved to have thine ears nailed to the Pillory.* Patch. 37. Eliz. B. R.

To me there seems great reason, that these five last should bear an Action, for they necessarily imply the doing of such a thing as hath deserved it, yet the current Opinion and Cases go the other way.

And yet it is held for many, if not for any of these words, if any special loss can be averred to come to the Plaintiff by them, that he may have this Action for the speaking of them, also many of these words having reference to a man in his Office or Trade, are Actionable. *Co. 4. 15. 17. 20. M. 19. Jac. B. R. Harisons Case.*

IT matters not whether the Plaintiff set forth all the circumstantial words as they were spoken, so as he set forth the very words truly, as if he set forth the talk be, *Will you be present at such a trial between A. and B. and in truth it was between R. & B.* [or the like] and he say, *Ile warrant you B. dare not be there, for he is broken.* Hil. 17. B. R. Jac. Johnsons Case.

An Action will lie for these words, *I will justify that Bams is accessory to the Burglary for which C. D. was hanged,* without averring that he was hanged for such a Burglary. Trin. 9. Jac. B. R. Adjudg. *Barns and Hunts Case.*

If an Action be brought for saying words, as, *Thou hast strained my Mare, art mean sworn,* or the like, there must be an averment, that the words have such a meaning in that Country, but this is confidently denied by others: see in *Marsh. f. 48.* the safe way is to aver it.

If an Action be brought for saying, *A man hath killed I. S.* and he sue for this slander, it need not be averred, that the party said to be killed is dead, Adjudg. B. R. *Cook. 4. 16. Hob. Rep. p. 111.* and this seems to me clear Law, yet hath been much opposed.

If the slander be upon a report, it must be averred, that there was no such report. *Hil. 4. Jac. B. R. Lady Morrisons Case,* and *Pasch. 42. Eliz. Co. B. Morles Case,* Adjudg.

Sect. 13.
Of an Averment in this Action, and where, &c. what Averment is necessary, and what other thing must be shewed in the Declaration to maintain the Action, or not.

If an Action be brought for saying, *Thou wast in the Gaol at S. for robbing, &c.* he needs not aver that he was not in Gaol, but this is the best pleading. *Sprat and Haynes Case.*

By the better opinion this Action will lie for a slander in another Tongue, or by a strange word, without averment of the meaning of the words. *Hob. Rep. pl. 165. 268. Marsh. Fol. 18.* But an averment of special damage is not necessary, in case where the words touch or concern a mans life, liberty, or member, or any corporal punishment, or which scandal a man in his Office or Trade, or which charge him with any great infectious disease, by reason of which he must be separate from humane society. But if they be in scandal of a mans Title, or in other cases, there must be an allegation of particular damage; yet the best way in all these cases is to alledge some speciall damage, if the Case will bear it.

If any words be spoken (in themselves not actionable) of a young woman or man, charging them with Incontinency or otherwise, by which they lose their match, or of any man by which he loseth an office, service, or preferment he stands for, his loss of the match, or office, &c. must be specially averred, or else it is not good. *Pasch. 25. Car. B. R. Axes Case. Sandersons Case, Trin. 17. Car. Co. B.*

So if any words of passion onely, not actionable, be spoken, as to say, A man is forsworn, he is a Rogue, Villain, or the like, if any Action be brought upon them, it must be maintained by a special Averment of loss. *Co. 4. 15.*

There are other words which concern matter merely spiritual, and determinable in the Ecclesiastical Court only, as for calling a man a Bastard, an Heretick, a Schismatick, an Advoucer, a Fornicator; for calling of a woman a whore, or charging her with any particular act of Incontinency, or the like; yet in these Cases with an Averment of a particular damage, an Action will lie at the Common Law, as it is adjudged in *Anne Davis Case. Co. 4. 17. a. and F. 20. a. 27. H. B. 14. the Register F. 54.*

By *Pophams* Chief Justice, If one say of a woman that is an Inholder, *That she hath a great infectious disease, by which she loses her Guests*, an action will lie; this must be taken with

an Averment of that particular damage; otherwise an Action will not lie, unless the disease be such for which she ought to separate her self, or to be separated by the Law from common society. *Co. 4. 17.*

Axe and Moods Case cited before, the Plaintiff being a Dyer, brought an Action for these words, *Thou art not worth a Groat*; adjudged that the words were not Actionable, because that many a man in his beginning is not worth a Groat, and yet hath good credit with the world. *Pasch. 15. Car. B. R.* But in this Case it was agreed, that if the Plaintiff had averred specially that he was thereby damnified, and had lost his credit, so that none would trust him, with such an averment the Action would have layen.

In the Case of the Foreman of a Shoemakers Shop, cited before, for these words, *It is no matter who hath him, for he will cut him out of doors*, the Plaintiff averred, that the common acceptance of these words, *inter Calceareos*, is, that he will beggar his Master, and make him run away, and shewed a special damage by the speaking these words, and it was adjudged, that the Action would lie, which I conceive was onely for the particular damage; for to say of a servant, *that he doth cheat, conzen, or defraud his Master, or that he will beggar his Master, &c.* the like, will not bear an Action without an Averment of a particular damage. *M. 15. Car. B. R.*

And in this Case it was said by the Court, that for some words an Action will lie without an Averment of any particular damage, as for calling of a man Thief, Traytor, and the like; and some words will not bear an Action without an Averment of a particular damage. As if a man shall say of another, *that he kept his wife basely, and starved her*; these words of themselves will not bear an Action; but if the party of whom they were spoken, were to be married to another, and by these words is hindred; in such Case, without an Averment of the particular damage, an Action will lie.

So likewise in the Case of *Dicks and Fenne*, which I cited before, where one said of the Plaintiff, being a Brewer, *that he would give a peck of Mault to his Mare, and lead her to the water to drink, and she should piss as good Beer as the Plaintiff Brewed*;

Brewed; it was resolved that the words themselves were not actionable, because of the impossibility of them. But it was agreed by the Court, that if there had been a speciall damage alledged, as loss of Custome, or the like, the Action would have layen. *M. 15. Car. B. R.*

Haws Case cited likewise before; one said of him, that he had spoken against the Book of Common Prayer, and said, *That it was not fit to be read in the Church*, for which he brought his Action, and shewed how, that by reason of the speaking of these words by the Defendant, he was cited into the Ecclesiastical Court, and had paid and expended several sums, &c. adjudged that the words themselves were not actionable, because if they had been true, they charge him onely with an offence against a penal Law, which doth not inflict corporal punishment, but for non-payment of penalty. *M. 17. Car. B. R.* But it was resolved, that for the particular damage the Action would lie.

That in all Cases for words, where there is any thing that is the cause or ground of the action, or tends necessarily to the maintenance of it, in such Case the action will not lie, without that thing be expressly averred to be, or not to be, as the Case requireth. *Hastewood and Garretts Case* cited before; who-soever is he that is the falsest Thief, and strongest in the County of *Salop*, whatsoever he hath stolen, or whatsoever he hath done, *Thomas Hastewood* is falsest then he; resolved that the words were actionable, with an Averment that there were *Felons* within the County of *Salop*, but for default of such averment, the Judgement given in the Common Pleas was reversed in this Court, *Pasch. Jac. B. R.*

Note Reader, if there were no *Felons* in that County (which will rather be intended, if it be not averred, that there were some) then the speaking of the words could be no slander to the Plaintiff, and so no Action can lie. *Hob. Rep. 309.* *Blands Case* cited before; he brought an Action against *A. B.* for saying, *That he was indicted for Felony at a Sessions holden*, &c. and did not aver that he was not indicted, and after a verdict for the Plaintiff, Judgement was stayed, because there was no averment, *ut supra*. Note, if he were indicted, which

which he doth tacitly admit, yet no cause of Action, for the words in themselves are not Actionable. *Hob. pl. 209.*

Johnson against *Dyer*, the Defendant having communication with the Father of the Plaintiff, said to him, *I will take my Oath that your Son stole my Hens:* And the Plaintiff did not aver that he was his Son, or that he had but one Son, & therefore adjudged that the Action would not lie in this Case; if he were not his Son, then no cause of Action. *M. 15. Car. B. R.*

One *Clark* said that he had a son in Nottingham-shire who had his Chest picked, and one hundred pounds taken out of it, in one Locksmiths house, and I thank God I have found the thief who it is, it is one that dwelleth in the next house, called *Robert Kingston*; upon which *Kingston* brought an action, and had a verdict, and it was moved in arrest of Judgement, because that he did not aver that he dwelt in the next house. *Pasch. 7. Jac. B. R. Crook.* One said that *Pritchards* man robbed him, who brought an action, and did not aver that he was *Pritchards* man; and therefore it was held that the action would not lie, and the Justices in this case would not give judgement.

Non constat in this Case, that the Plaintiff was the party of whom the words were spoken; for there might be another of the same name dwelling elsewhere; and therefore he ought to aver that he dwelt in the next house, that he may be certainly intended to be the same person of whom the words were spoken.

THE Defendant may plead not guilty; or if the Plaintiff sue upon some of the words, when all together are not actionable, the defendant must set them forth at large, (*Coo. 4. 13. 19.*) as he spake them, and traverse, or justify, or plead not guilty to the rest of the words, as the Case is. *Coo. New book of Entries, f. 24. a. 25. a. 26.* or if the words be true, and he be able to prove it, he may justify the speaking of them; as if I say *I. S. was perjured*, I may shew he was so in the Starchamber; or he is a thief, I may shew he was attainted of *Petit Larceny*.

Sec. 14.
What shall be said a good bar or plea in this Action.

It is not a good justification for calling one Murderer, Justification.

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to

to say there was a murder done; and the Plaintiff was indicted for it, or that the common fame was he did it. *Dyer* 236. *Broo.* 127. New book of Entries, 26, 27. Nor can one justify for charging one with a Felony after he hath a pardon. *Hob. Rep. pl.* 106. 71. To say a man was indicted for Felony at *S.* it may be justified, if it be true. *Hob. Rep. pl.* 289. but the words are not actionable. So in a charge of *Perjury* it is not a good justification to say he swore such a thing in a Court falsely, unless he add this, knowing it to be false. *M.* 38. & 39. *Eliz. B. R. Willis Case.*

If one call a man Thief, he may justify it, for that he stole a sheep. *Hob. Rep. f.* 258, 27. *H.* 8. 22.

If *I. S.* say to another, *I. S.* is a Thief to *I. S.* and to me, and in an Action brought by him, I justify for a Felony done to me only, this is not sufficient; for the charge is of a double Felony, and the justification to a single Felony. *M.* 21. *Jac. B. R.*

Sect. 15.
Where the
Verdict of
the Jury will
maintain the
Declaration
and the Action,
or not.

THAT where the words that are found do not agree with the Declaration in the substantial and essential form, that in such case they do not warrant the Declaration: But if they do agree in the substantial and essential form, though they agree not in every word, yet they do well warrant the Declaration, and by consequence maintain the Action.

Sydenham against *Man*, for these words, *If Sir John Sydenham might have his Will, he would kill all the true Subjects in England, and the King too; and he is a maintainer of Papistry, and Rebellious persons.* The Defendant pleaded other words, and traversed the speaking of the words *modo & forma*, &c. the Jury found that he spoke these words, (*viz.*) *I think in my conscience that if Sir John Sydenham might have his Will, he would kill, &c.* and find all the subsequent words before alledged. In this Case it was resolved against the Defendant. *Hob. Rep. p.* 252. *pl.* 213. But this Case notwithstanding is doubted by some.

Fenner against *Mutton*, in an Action upon the Case for words, which were thus; *Nicholas Fenner procured eight or ten of his Neighbours to perjure themselves; the Defendant pleaded not guilty; and the Jury find that the Defendant said,*
That

That *Nicholas Fenner* had caused eight or ten of his Neighbors to perjure themselves. *M. 4. Jac. B. R.* This was doubted by *Tanfield Justice*, and by him held not a sufficient Verdict to maintain the words.

Chipsam against *Leek* for these words, *Chipsam is a Thief, for he hath stolen a Lamb from A. and Geese from B. and killed them in my ground:* Issue was joyned whether the Defendant spake the words *modo & forma*, &c. the Jury find that the Defendant said, *That the Plaintiff was a Thief, for he hath stolen a Lamb from A. and killed it in my ground;* but they find that he spoke nothing of the Geese: yet it was resolved that the finding of the Jury did well warrant the Declaration of the Plaintiff. *Hil. 3. Jac. B. R.*

Norman and *Symons* Case; the Plaintiff brought an Action for words, and declared that they were spoken *falso & malitiose*; the Jury find the words spoken *falso & injuriose*; and it was adjudged that the Action would not lie, because the finding of the Jury doth not warrant the Declaration in the substantial form of it. *Trin. 7. Car. B. R.*

Burgis brought an Action for these words, *Burgis is a maintainer of Thieves, and a strong Thief himself;* Issue was joyned whether the Defendant spoke the words *modo & forma*, and the Jury found all the words except the word [strong] and in this Case the Plaintiff had Judgement. *6. E. 6. Dyer f. 75. fol. 21.* Here we may observe, that though every word alledged in the Declaration be not found, yet the essential and substantial form of the words being found, that is sufficient to maintain the Declaration. This I say you may observe, not only by this Case, but the Cases also before pur.

Barber brought an Action against *Hawley* for these words, *John Barber and his children be false Thieves; men cannot have their Cattel going upon the Common, but they will kill them, and eat them, &c.* Issue was joyned whether the Defendant spoke the words *modo & forma*, and the Jury found that he spoke these words, *viz. Men cannot have their Cattel going upon the Common; but John Barber and his children will kill them with Barbers dogs;* in this case it was adjudged for the Defendant.

The Action is brought for saying, *I know him to be a Thief;*

M. 2

and

and the Defendant pleaded other words *absque hoc*, and the Jury find he say, *I think him to be a Thief*; this is not sufficient. See *Hob. Rep. pl. 213.*

If one say to another of a woman passing by, *She is a Witch, and hath bewitched my Child* [*Innuendo the Plaintiff*] and Verdict is given for the Plaintiff, now it is out of question. *Pasch. 18. Jac. B. R. Roberts Case.*

If the Declaration say, that the Defendant spake of the Plaintiff these words, *Eyes* [*Innuendo the Plaintiff*] *is a Thief*, and Verdict be given hereupon for the Plaintiff, this is good and made certain. *Eyes Case. Adjudg. M. 7. Jac. B. R.*

If one bring this Action for divers words, whereof some are, and some are not Actionable, and the Jury assels damages for all together, this is Errour and cause to arrest the Judgement. But if it appear they do distinguish them, then it is well. 25. *Eliz. B. R.* Out of all this take notice it is good policy, when one lays his Action for words, to suppose the Action for divers slanders, as for words spoken at several times, and several ways, that in one of the charges the Plaintiff may be sure to hit the very words, or the substance thereof.

We have done with Actions of the Case for slanderous words; and now we come to other Actions of the Case which have reference to mens Deeds: And we shall begin with these which arise about Contracts, and concern Assumpsits. The which having so near a reference to Contracts, for that every Executory Contract doth import in it an Assumpsit, we must of necessity premise something (at least so much as may necessarily tend to the clearing thereof) concerning *Contracts*.

CHAP. XV.

Of a Contract.

Sect. 1.
Contract,
what it is.

WE shall not say any thing to Contracts or Bargains about Free-holds, having spoken thereto in another Treatise; but to agreements about Chattels, and the like: And so a Contract taken largely, is an agreement between two or more, concerning something to be done, whereby both parties

ties are bound each to other, or one is bound to the other. But more strictly it is taken for an agreement between two or more, for the buying and selling of some personal goods, whereby property is altered.

These Contracts are of divers kinds; for some of them are in Deed or Express; and some of them are in Law, or implied. Those in Deed or Express are some of them Absolute, and some Conditional. And both these are sometimes in writing, as Obligations, Leases, &c. (of which we have nothing to say in this place:) And sometimes by word only. They are also sometimes clad with a consideration, and have *Quid pro quo* in them, which is the material cause of the Contract, when some recompence in Deed or in Law is given, which maketh it binding and Actionable. And such a Contract is defined to be a Covenant or Agreement with a lawful cause or consideration. For such an Agreement, concerning personal things, ought to be executed with a recompence, or to be so certain, as to give Action or other remedy for the recompence. And sometimes they are alone and without consideration, and then if it be by word, and not in writing under-hand and Seal, it is *Nudum pactum*, which is said to be when there is no consideration, or cause of the Covenant it self. Sect. 2.
How many kinds of it there be.

These Contracts also are sometimes real, when they are about Land, as where one doth agree to give one hundred pounds for a Lease for years of Land, or to give so much in Rent for such a Lease; and sometimes they are personal, as when they are of and about a personal thing; as when one doth sell a Horse for money. Also some of them are exempted, when the thing agreed to be done is presently done; or they are executory, when all, or part of the thing agreed to be done is yet to be done: And this is an Assumpsit, *Finch*, 451. *Assumpsit.* *Dyer* 336. *Co.* 4.44. *Plow.* 1.30. 140.308 *Dyer* 30.14. *H.* 8.19

They are also single and absolute, or conditional, and with reference. Contracts in Law, or implied Contracts, are such as do not arise from the special agreement of the parties, but Law. Contracts in Law.

are made by the Act and operation of Law; as where an

Hostler giveth my horse meat, or a Taylor maketh my garment, that the one should be paid for his meat, and the other for his work; and the one may keep the garment, the other the horse till they be paid; or if they deliver the things, they may have an action of Debt or the Case for their recompence; So where one doth finde my goods, he is chargeable to me, by reason of his possession in an Action of the Case upon a Trover and Conversion. So if I come into an Inne, and call for provision, the Inn-keeper may have an Action of Debt or the Case for the money. *Finchesley, fol. 180.* So he that receiveth money to my use, or to deliver over to me, is chargeable in Law in an Action of Account to me as a Receiver. And he that encreth into my Lands, and taketh the profits thereof, is by Law chargeable to me as my Bailiff. So if a Liberate be delivered to the Clerk of the Hamper, who hath Assets in his hands, an Action of Debt lieth against him. So it doth upon every Judgement. And it is thought by some, an Action of the Case upon the Contract in Law may lie in some of these Cases.

Account.

Debt.

Sec. 3.
What shall be said a good parol contract, or not. In respect of the persons to the contract, and where one shall charge, or be charged by the contract of another.
Feme covert.

IF a Feme Covert sell the goods of her husband by authority precedent from him, or if he do afterwards agree to it, or if he do not disagree to it during his life time; in the two first Cases clearly, and (as it seems) in the last also; this shall binde the husband, and he or any other cannot avoid it, *27. H. 8. 25.* So if the wife buy any thing by authority general, or special, from the husband, or without authority, if it be for her necessary apparel, the husband shall be charged by these contracts: So where the wife doth use to buy and sell and manage the estate of the husband, there her contracts shall binde him; but if she buy any thing for her husband, or to his use, without any authority general, or special, from him, he shall not be charged by this contract, although the thing bought be spent in his house. And yet if he agree to it after the buying, it shall binde him: *21. H. 7. c. 20. H. 6. 22. old N. B. 62.* And in these cases in the suit the contract may be set forth to be made by the husband himself, when it is made by his wife.

Servant.

The contract of the servant in buying will binde the Master, and

and make him chargeable to an Action for the things bought in all these Cases. 1. When the servant is a known and a common Bailiff to his Master, and is used to buy for him, and he doth mention his Master in the bargain, and buy for him. 2. Where the Master did give a precedent authority so to do, and he doth mention his Masters name in the bargain, and buy for him, though the Master never have the thing bought; and in these two Cases the contract is good, though the Master have no notice; and any friend may be a servant in the last Cases; for if my servant, by my appointment, buy any goods for me, or to my use, by this the property of the goods are in me; and this shall be said my buying, and I may be compelled to have it. *Trin. 9. Jac. B. R. Moores Case.* 3. Where the thing bought doth come to his Masters use, and he doth assent to it; but if it do come to his Masters use, and he doth not agree to it, *contra.* especially where the things are unnecessary. 4. When he doth after assent to it, though it come not to his use; for a subsequent assent is equivalent to a precedent authority, and the Seller may have an Action of Debt against the Master; and if the servant do make any special promise to pay the money, he may have an Action of the Case against the servant. *Fitz. 20. 27. Ass. 5. Plow. 11. F. N. B. 62. Do. & St. a. 137. Dyer. 237. F. N. B. 120. G. 11. H. 6. 20. 21. H. 7. 40.* And it seems these contracts are good, albeit he doth not use his Masters name. But in other Cases the contract is void as to the Master, and will not binde him. So in selling the Masters goods or chattels, the contract of the servant will binde the Master, and alter the property of the thing sold, in these following Cases. 1. Where the servant hath a precedent authority, general, or special, from the Master, to sell the thing; and in this Case the contract will binde him, albeit he pay not his Master the money, and he have not notice of the contract. But if he give away the thing, *contra.* 2. Where the Master after notice of the sale doth agree to it. 3. Where albeit he have no such authority; yet if he be a common and known Bailiff, and use to buy and sell for his Master. And if such a servant sell or pledge his Masters Horse, or exchange his Ox for Wheat that

that cometh to his Masters use, this is good, and the party that hath contracted with him, need not averr that he had authority from his Master. And in all these, and such like Cases, the Master may suppose the contract to be made with himself; and sue in his own name for the money. *Qui per alterum fecit per seipsum facit.* Dyer 230. *Noy* 10. *Finchesley*. 66. *Brook Contract*. 24. If I send my servant to a Market or Fair to buy any thing for me, and do not tell him of whom he shall buy it, in this Case, of whomsoever he buy it, I shall be chargeable: But if I bid him buy it of one man, and he buy it of another man, in this Case I shall not be chargeable. *D. & St.* 137. So if I bid another deliver my servant what he shall call for, and I will pay him; in this Case I shall be chargeable for whatsoever my servant doth fetch. *Coo*. 8. 146. And if my servant that hath authority to sell my goods, do sell and warrant the goods, this is a good sale to binde me; but the warrantie will not binde me. 11. *Ed.* 4. 7.

If a Taverner, or Mercers servant, or a Parker, Bayliff, or Shepherd that hath the custody of his masters goods, and perhaps power to sell them, do give away any of them, this gift will not binde the master, and therefore he may sue them that shall meddle with the goods upon this gift. *Noy* 110. *Broo.* Done 56.

If my servant be sent by me to one that doth owe me money, for it, and he pay it to him, this doth discharge him, and binde me. But if he go without sending, or with a counterfeit letter or message, and the party deliver the money, this will not binde me, nor discharge him; and yet if the money come to my use, and I agree to it, it will binde me, and discharge him. *Doc. & St.* 138.

If I make a man my general receiver, & he receiveth money of a Debtor of me that am his master, and maketh him an acquittance, but doth not pay the money to me, yet this payment shall discharge the debtor; but if he make an acquittance to him, not having received the money, this will not binde me, nor acquit him. So if he take a Horse by agreement for the debt, this will not binde me. And yet if I by writing make another my general receiver, and give him power thereby to make

make acquittances, and he make acquittances of debts not received, this will binde me, and quit them. *D. and St.* 138. *Nej* 111. And if the Receiver exceed his power, if I do afterwards agree to it, it will be a good Bar to me. *D. & St.* 130. 131.

A Traytor or Felon after his offence, and before his conviction, may *Bona fide* sell any of his goods to maintain himself. *Coo.* 8. 95. 171.

All Contracts made by an Infant under one and twenty Infant years old, though but a day, are naught and unbinding, and though never so much to his profit; nor hath a man any remedy in Conscience. *Coo.* 9. 87. *Plow.* 364. 10. *H.* 6. 14. *Austins* Case. *M.* 9. 74c. Save only such contracts as are for his necessary Apparel, Food, Physick, or Schooling. *Coo.* super *Litt.* F. 172. 18. *Ed.* 4. 2. Yet some say, if he sell a Horse or goods, and deliver it with his own hands, that this is only avoidable, not a void contract. 26 *H.* 8. 2. 21. *H.* 7. 39. 18. *Ed.* 4. 2. But it seems he cannot sue for the money, but he may take his horse or goods again, or sue for them. And if he buy a horse, and give earnest, and the seller break with him, he may have an Action of the Case, but shall recover small damages; for the earnest is recoverable again in an Action of Account. *Heb. Rep.* pl. 96. and he may avoid his own Acts.

But an Ideot, made so by Gods Hand, whiles he is so, if he doth make any such contract, it seems himself, not any other cannot avoid it, especially if he make himself so by his drunkenness or passion, or the like. *Coo.* 4. 127.

Executors and Administrators regularly shall be charged with, and take advantages of the contracts made by their Testators. *Coo.* 9. 86. *Plow.* 82. See for this my Book of *Common Assurances*.

Two things only seem to be necessary to the making up of a good and binding contract, such a one as to produce an Action. 1. That there be a good consideration; for if there be none, or no good consideration (that is) there be no benefit to the party by whom, nor prejudice or trouble to the party to whom the promise is made, the contract is void; And so also it is where the consideration is unlawful.

Sect. 4.

In respect of the contract it self, to raise an Action.

N

2. The

2. The agreement must be perfect; for if it be only in inception, that there be a Treaty and no perfection, it is but a communication, which will not bear up an Action. *Co. 10. 102 76. Dyer. 356. 17. Ed. 4. 4. 9. H. 7. 21. 10. H. 7. 6.*

If one make a Lease for years in consideration of a Rent, there is in this *Quid pro quo*, and the consideration is good on both sides to raise an action. *Kelw. 69.*

If I lend one money, and thereupon I enfeoff me of Land, and by agreement I am to have the profits of the Land till he pay me my money; this is a good contract, and it seems I can bring no Action for the money whiles I have the land. *Fitz. Debt. 100.*

If I agree with another to give him so much for his horse, as *I. S.* shall judge him to be worth; when he hath judged it, the Contract is compleat, and an Action will lie upon it, and the buyer shall have a reasonable time to demand the Judgement of *I. S.* and if *I. S.* die before Judgement, the Contract is determined. *Plow. 6. 14. H. 8. 19.* But then it seems the horse must be delivered, or money paid, ere the property will alter, or Action lie for the money. So if an Agreement be, that the buyer shall go and see the thing, and if he like it, shall give so much for it; and he when he seeth it, doth once declare his liking of it, and thereby his bargain is perfect, he cannot afterwards disagree to it, and then Action will arise on both sides. *18. Ed. 4. 16.* and if he once dislike, hereby the Contract is determined. *18. E. 4. 16.*

If the Contract be to pay part of the money presently, and the rest at a day to come, and the seller give him time till that day to refuse, in this Case, if he agree before the day, the Contract is compleat, and reciprocal Actions will lie for the things and money. *Dyer. 99.*

If the Agreement be, that he shall see the thing, and if he like it when he hath seen it, for so much money he shall have it, in this Case when he hath paid the money, and agreed to have it at the Rate, the Contract is perfect, and Actions will lie. *17. Ed. 4. 1.*

If a Contract be made for twenty bushels of corn at a price, and that the buyer shall pay for them as he doth fetch them,

them, this is a good Contract, and the party must pay for it as he doth fetch it, or the seller may refuse to deliver it. *Djer.* 30.

If the Contract be to have, for Cattel sold *x. li.* if the Vendor do such a thing, else *xx. li.* this is a good Contract, and certain enough, and Actions will lie accordingly. *Perk. Sect.* 712. 714.

If I sell one Wares for *xx. li.* to be paid when they are delivered, this is a good Contract; and when they are delivered, and not before, the Action will rise. *Fitz. Deb.* 56.

If I sell a thing to another, and no price is agreed upon, and he take the thing into his hands, yet the Contract it seems is good; & if it be Wine, or any such like thing, the certain price whereof is known, and set by Law, the seller may sue for so much money in certain. But in other Cases he must in his Action surmise that he promised to pay as much as it was worth, and averr it was worth so much in certain, *Trin.* 3. *ac. R. R.*

TO make a good Contract, to alter property of a thing in sale thereof, there are three things required.

Sect. 9.
To alter property.

1. That the party selling, have an Ownership in the thing, or a power from the right Owner to sell it; or else that the thing be truly and without Coven sold in a Market Overt, if it be saleable there.

2. That there be a good consideration in the Agreement.

3. That the Agreement be perfect and consummate. For if there be only a parly about a sale, and no perfect Agreement, this is no good Contract on which to ground an Action. *Coo.* 5. 83. *Plow.* 302. 479. *Djer.* 98. See in *Property Chap.*

A Bargain and Contract of Goods and Chattels may be good without any such solemnity as is used in the bargain and sale of Lands, as Deed indented, Inrolment, &c. For it may be by word as well as by writing, with or without any words of bargain and sale, as well as by those words, by a Deed Parol as well as by a Deed indented, and that without any Inrolment at all, and without any delivery of any part of the things sold, or any piece of money (as the manner is) in the name of Seisin. But in this Case also, some respect

is to be had unto the cause and consideration of the bargain, as well as in the Case of the bargain and sale of Lands. For howsoever, perhaps in the Case of a Grant or bargain, and sale of Goods or Chattels by Deed in writing, the consideration is not material; And that if a man do by his Deed under Hand and Seal, bargain and sell Timber trees, or any other thing without any consideration at all, the same may pass well enough; yet if the contract be by word, or by writing sealed, and not delivered, if there be no consideration, or no good consideration of it, it is of no effect at all. And therefore if a man by word of mouth sell to me his horse or any other thing, and I give him, or promise him nothing for it; this is void, and will not alter the property of the thing sold. But if one sell me a horse or any other thing for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or all, or part of the money is paid in hand, or I give earnest money (albeit it be but a penny) to the seller, or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment; in all these Cases there is a good bargain and sale of the thing, to alter the property thereof; and in the first Case I may have an Action for the thing, and the seller for his money; in the second Case I may sue and recover the thing bought; in the third I may sue for the thing bought, and the seller for the residue of the money; in the fourth Case where earnest is given, we may have reciprocal remedies one against the other; and in the last Case, the seller may sue for his money. If *A.* sell Cloth to *B.* for ten shillings, and *B.* takes away the Cloth against the will of *A.* in this Case *A.* shall have an Action of Trespass against *B.* and if *A.* sell the Cloth to *B.* for ten shillings, in his election to make it a bargain or not; and if he will, he may keep his Cloth untill the other pay him; and if *A.* say nothing, but doth suffer *B.* to take it away, he may make it a bargain if he will, and bring an Action of debt for his money. If I offer money for a thing in a Market or Fair, and the seller agree to take my offer, and whiles I am telling

telling the money as fast as I can, he doth sell the thing to another; or when I have bought it, we agree that he shall keep it until I can go home to my house to fetch the money; in both these Cases, especially in the first, the bargains are good, so as the seller may not sell them afterwards to another; and upon the payment, and tender, and refusal of the money agreed upon, I may take or recover the things. *Dyer*. 29. 30. 14. *H.* 8. 19. 9. *H.* 7. 21. 21. *H.* 7. 6. 10. *H.* 7. 6. *Plow.* 432.

If one bargain and sell his Land, and the trees upon it, but *Sale of trees.* the Deed is not inrolled, and the land doth not pass; in this Case the trees will not pass neither. *Coo.* 11. 48. If a Tenant in Fee simple for good consideration, sell his trees upon the Land, the sale is good, and the buyer may cut and take them away, although the seller be dead. But otherwise it is a Tenant in tail; for there the buyer must cut them in the life time of the seller, or he cannot take them after his death. *Coo.* 11. 50. *Perk. Sett.* 38.

If I sell my horse to one first, on condition that he pay me five pounds at a day; and before the day I sell him to another, this second contract it seems is void, albeit I be not paid my money, and I do afterwards seize my horse again. *Plow.* 432.

If a contract be for any thing at a price; but withall it is agreed that the thing must be delivered to the buyer at such a time and place; this is a good contract, to alter property if it be delivered accordingly. *Fitz. jurans de faise* 144. And so if it be to give so much as *I. S.* shall set down, when he doth set down, and the thing is delivered, the property is altered. 14. *H.* 8. 20. So if it be that he shall see it, and if he like it, and take it away, he shall give so much, and he take it away; and so in all such like Cases the Law is alike. 18. *Ed.* 4. 16. *Dyer* 99. See more in *Property* Chap.

If two lay money on a wager, and put it into a third mans hands, he that wins it may have it, and he that loseth it hath no remedy for his money again, Agreed at *Sarum* Assizes. 9. *Car.*

Sec. 6.
To bar a debt.

IF one ow me twenty pounds, and I buy of him goods to the value of five pounds; and it is agreed he shall keep up this five pound towards his twenty pounds; it is said this is no good contract, nor pleadable in bar, if he sue me for the five pound. *Fitz. Debt. 36. Quere.*

If one promise me that I shall retain a rent I ow him for money he is to pay me, it seems I cannot plead this in bar to the rent, but I may bring my Action upon the promise, if there be consideration for it. *M. 9 Jac. B.R. Jarvis Case.*

Sec. 7.
How a parol contract shall be taken.

IN parol contracts, equity doth much rule, and the meaning of the parties is much more regarded then the form of words; and therefore if a sale be of Tods, Pounds, Bushels, Yards, or Els of any thing, it shall be accounted, measured, and reckoned according to the custome of the place, and not according to Statutes, *Kelm. 87. 27. H. 8. 14. Plow. 140. 41.*

If one promise twenty pieces for a thing; it shall be expounded twenty pieces of gold of two and twenty shillings a piece; for this is the common intendment. If the contract be for twenty barrells of Ale, or ten pottles or cups of wine, the buyer shall not have the barrells in the first, nor the pottles or cups in the next Case. But if the bargain be for hogheads, or firkins of wine, there he shall have the hogheads, and firkins of wine. *Plow. 86. 17. H. 8. 27. Broo. Contract. 4.*

If the Contract be for a Lease for years, and say not when it shall begin, it shall begin presently. *Co. 6. 33.* If one Lease Land, excepting all his trees, hawks do breed in the wood, in this Case the seller and not the buyer shall have the hawks. *14. H. 8. 1.* If one promise for good cause to make good a house, this shall be taken to repair it. *M. 21. Jac. B.R. Keys Case.* If one promise to pay money at several dayes, no Action of debt will lie till all the dayes be past, but an Action of the Case will lie after the first day. *Co. 10. 128.*

Sec. 8.
Where a contract shall be said to be gone and determined in all, or part, or not.

IF one make a Lease for years, rendring rent, and the Lessee be ejected of all the Land by title paramount, the contract is discharged, and he not bound to pay the rent, nor will any Action lie for it; but if the entry be upon part, the whole

whole rent doth continue. *Broo. Sett. 52. Lit. Sett. 58. Broo. 135.* Also if one make a Lease for years of that Land wherein he hath no estate rendring rent, for this rent no Action will lie, for the Lessee will avoid it by shewing this. But if the Lease be by Deed indented, *contra. Finchesley f. 45. Lit. Sett. 58.* And yet if a Lease be made for years, rendring rent, and the Lessor enter upon the Land during the Lease, against the will of the Lessee, by this all the rent is suspended during his possession, and no part of it can be sued for; for it shall not be apportioned. *9. Ed. 4. 1.*

If a debt be due to me upon a contract, and I take an obligation for it, or any part of it, by this the whole contract is determined. *Dyer. 21. 21. H. 7. 5. F. N. B. 121. Co. 6. 45. 3. H. 4. 17.* and no Action can be brought upon it afterwards. And yet if I take a writing indented and sealed (but not delivered) for it, or an obligation from the party that is not good, or that is after made void, or an obligation good from a stranger, and not from the party, in all these Cases the contract is not determined. *Dyer. 230. Fitz. Debt. 66. 21. H. 7. 5.* If I bring an Action upon a contract, and get a judgment in the suit, hereby the contract is determined, and no Action can be brought upon it afterwards. *9. Ed. 4. 54. Dyer. 21. 21.* though execution be not done. *9. Ed. 4. 54. 39. H. 6. 34.*

If an Abbot had bought goods, and part of it had come to the use of the house, and part not, yet the successor was chargeable for all the money. *38. H. 6. 28.* If one promise me three shillings a week for his dyet and lodging, and I finde him dyet, but not lodging, no action can be brought on this contract for three shillings a week, but an action will lie for the dyet upon the contract in Law. *9. Ed. 4. 1.*

If I be an Artift, and one promise me ten pounds to teach him my Art seven years, and I die before the seven years, by this the contract is expired, and if the money be not paid it is lost, and is not recoverable. But if the money be paid, he hath no remedy; and if he have given bond for it, it seems he must pay it, and is without remedy. *21. Ed. 2. 11.* If one promise to serve me a year for ten pounds, and before the year be expired he doth depart out of my service, or dye, or

I discharge him, and he agree to it, the whole debt is lost; but it is said if the money were to be paid quarterly, and he overlive the quarter, that he shall have the quarters wages. 10. *Ed.* 4. 18. 10. *H.6.* 25.

If a contract be to pay for a thing sold so much as *I. S.* shall set down, and *I. S.* dye before he set it down, hereby the contract is determined. 4. *H.* 8. 19. If the husband sell the trees from his wives land for a summe of money, and the buyer doth cut and carry away part of them, and the wife dye before he doth cut the rest, now by this he is let of cutting the rest, and yet he must pay all the money, the contract is not gone. But if the contract were to cut them at such a day and not before, and he cut part before this day, and the dye before the day, in this Case he cannot be forced to pay any of the money. *Broo. Contract.* 26. 18. *Ed.* 4. 6. A parol contract may be determined by a Release in Deed or in Law. *Hob. Rep. pl.* 27.

If I make a Lease for years, and sale of goods by one contract for one entire summe of money, and the goods be taken away from him by the right owner before the money be paid, yet he must pay me all the money. So if I sell two horses for ten pounds, and one of them is another mans, who doth take him away, yet the contract doth continue, and I may recover the whole ten pound; but he may have his action of the Case against me for selling that which is none of mine. The same Law is (as it seems) where all that is sold is another mans, and he take it away, 7. *H.* 7. 4. *Coo.* 3. 22. 18. *Ed.* 4. 6. 9. *Ed.* 4. 1. 12. *H.* 8. 13.

Sec. 9.
Bar in avoy-
dance of debt
on a contract.

IT may be determined by an Arbitrement also. 4. *H.* 6. 17. And all these things may be pleaded in avoydance of Actions upon these contracts; And so also may payment without an acquittance as some say, others not. 41. *Ed.* 3. 7. So also a bar by wager of Law in a former Action upon the contract will bar a man in another action upon the contract. *Fitz. Act of the Case.* 105.

For the further opening and clearing of this point, we shall upon this occasion digress a little, and say a word to the doctrine of a Pledg of goods. CHAP.

CHAP. XVI.

Of a Pledg.

A Pledg is a pawn of goods laid or bound for money borrowed peremptorily to be the goods of the Creditor for ever, if the money be not paid at the day agreed upon. As where one doth deliver a Chattel personal to a man in assurance of another thing had of him at the same time; and this is either in Deed, when it is by agreement of the parties; As if one pledg Jewels, Plate or Goods to another for twenty pounds which he doth ow to him; and if he do not pay the money at the day, that the party shall have them; in this case if he do pay the money at the day, he shall have the things pledged again, or an Action of *Detinue* to recover them if he refuse to deliver them. And if he do not pay the money at the day, then the other shall have the goods pledged for ever. And this is properly called a pledg. Or by Law when it is by operation of Law; So a garment in a Taylors shop is a pledg; for he may keep, but cannot sell or use it till he be paid for the making of it. So a horse in a Hostery is a pledg; for the Hostler may keep him, but not use or sell him till he be paid for his meat: And if he leave him till his meat comes to as much as the horse, then he may sell him also. Agreed. *Trim. 3. Jac. B. R. Termesley. Mortgage. Lit. 352, 333. Keln. 82.*

Pledg of goods, what it is.

Detinue.

The nature of goods pawned, and the power and interest of the parties by whom and to whom it is pledged, are thus; The party that doth pledg the goods till the time of redemption or forfeiture come, and till they be forfeited, hath such a general property in the goods pledged, as if in this time they be casually lost, he must abide the loss; And they cannot be forfeited by the party that hath them in pawn for any offence of his; nor can they be taken in execution, nor attached for his Debt. And the party that hath them in pawn hath such a special property in them, that if the thing pawned be an Oxe, Horse, or the like, he may work it; if it be a Cow, he may milk it: And if it be any other thing that will not grow much worse by usage, as apparel or the like, he may use

The nature of it, and the interest and power of the parties thereunto.

Property.

Action of the Case. use it as the first owner thereof might have done. But if he abuse it, an Action of the Case lieth against him by him that did put it to pawn. And he that hath such a pledg, may assign over his interest to another, and the Assignee shall hold it subject to the same condition. And if the goods be taken away from the party that hath them in pawn, he may have an Action of Trespass for the taking thereof, and say *Quare bona & catalla sua cepit*. And if he that hath the pawn, dye before the day of redemption, his executor shall have it upon the same terms as he had it. *Broo. Attachment, 20. D. & St. 130. M.7. Jac.C.B. Levis Case per 3. Justices.*

Trespals.

CHAP. XVII.

Of Property and Chattels.

Action following Property and Ownership, as the shadow the body, and contract Chattels and Property having a near relation one to the other, we think it very pertinent to the clearing of the things preceding, and following, to treat a while ere we go further, of these two things, the which we shall put together:

sect. 1.
Property,
what it is.
The kinds
of it.

Property is the right that a man hath to any thing which no way dependeth upon another mans curtesie. And this of Lands and real things was said to be general or absolute, and special or qualified. The absolute Property of a thing, is a power to do with it what one will; And so they were wont to say no Subject had property in his Lands; for all the Lands of the Kingdom were said to be held mediately or immediately of the Crown. But by Property in this place we will understand the ownership a man hath of, and right a man hath to any Chattel. And for this we must know, that Chattels are possessions of goods moveable and unmoveable, except such as are in nature of a free-hold, or parcel of it. And these are either real or immoveable, which are such as do not immediately appertain to the person, but either to some other thing by way of dependance, as a box with writings of Land,

Land, the body of a Ward, the fruit of a Tree, or the Tree it self upon the Land; or are issuing out of things immoveable, &c of a more real nature, as Leases for years, at will, wardships, the estates of gardeins in Chivalry, which hold the Land for the single or double value, the estates of tenants by Statute Merchant, Staple or Elegit, and grants of the next advouson; or else they are personal and moveable, *i. e.* such as are moved by others, as money, plate, gold, silver, jewels, utensils, household-stuff, debts, wood cut, corn, emblements, hay, and the like; or such as move themselves, as Cattel, and the like; And therefore called personal, either because they are such as do immediatly belong to the person of a man, as a horse, &c. or because being detained from a man, he hath no means to recover them but a personal Action. And therefore are said to be moveable, because one may move them, and make them to follow a man from one place to another. And all these one may devise by his will; or if he dye, they shall go to his Executors or Administrators. Both these kinds of Chattels also are either in Possession, as when one hath his ward or his goods in hand, or in Action, which is where one hath not the thing it self, but an Action to recover it. And then it is called a Chose in Action. *Termes Ley. Stamf. Pr. cap. 16. Stat. 1. Eliz. chap. 2. Co. Super Lit. f. 42. 118. Plow. 192. Dyer. 277. 5. Co. 4. 65. 3. 12. Perk. Sess. 60. F. N. B. 128.*

Personal things also are either quick and living, as Beasts, Fowl, and the like; or dead, as money, gold, silver, and the like; the living also are either tame or wild.

Of these things there are three kinds of properties, Absolute, Qualified or limited, and Possessory. The absolute property is that general right which a man hath in a thing, without dependance on any other. The qualified or limited property is a property to some purposes; such a one the husband hath in his wives real chattels & debts by the marriage, but he hath an absolute property in her chattels personal: So of a pledge, he to whom it is pledged hath but a special property in it. The Possessory property is only so long as one hath the possession of the thing; And the general property is in him that did pledge. But of things which are *Fere*

natura, as fish in a River or Pond, fowl, wild beasts in a Field or Park, a man can have no absolute property; and of these he can have only a possessory property, the which he may attain by two means. 1. By Industry. 2. *Ratione impotentia & loci*. By Industry when he taketh them, or maketh them *Mansueta* or *domestica* (i. *manni* or *domui assueta*; in these he hath a property only so long as they remain tame. So of a reclaimed Hawk, or tame Deer, Pigeon, Coney, Pheasant or Partridge, Ferrets to catch Conies; for if they turn wild again, and have not *animum revertendi*, the property is lost, *ratione impotentia & loci*. And yet if one take wild beasts, or fowl, and keep them alive in a room, though they be not tame, he hath a property in them whilst they are there. So fish in a Trunk; and if any take them away, he may have an Action of Trespass for it. And if I have young Hawks in my Woods, or young Pigeons in my house, or boxes about my house, till they fly, I have a property in them, and may bring an Action of Trespass for the taking of them as for the taking of my own. But in case where one hath wild beasts, as Hares, Deer, Conies; or Fowl, as Pheasants, Partridges, Swans, or the like, *ratione privilegii* only, as by reason of a Park or Warren, here he hath no property in them; and therefore albeit he may bring an Action of Trespass for breaking his Park or Warren, and taking away his Deer, &c. yet he cannot say *Suos*; for if the owner of the Park dye, the game shall go with the Park, not to the Executor. Nor can any Felony be by the taking away of these things: But when they are made tame, the Law is otherwise. So also of Fish in a pond, albeit they shall go with the Pond, and not to the Executor, yet Felony may be done in them, as hath been adjudged. *M. 36, 37. Eliz.* But in all living tame things, as in Oxen, Cows, Sheep, Hens, Ducks, Geese, Capons, Horses, Bullocks, Swine, Goats, and their Eggs and young ones, and the like; and in all dead things, as Emblements, Timber, Jewels, Householdstuff, Implements, Utensils, Money, Plate, Corn, Hay, Wood felled, Wares, Merchandizes, Carts, Plows, Instruments of Musick, Coaches, and such like moveables, one may have an absolute

Trespass.

Executor.
Felony.

absolute and general Property. Also one may have a Property in things of a base nature, wherein no Felony can be committed; as a Blood-hound, Mastiff, Hounds, Gray-hound, Spaniels, &c. and for these he may have an Action of *Trespass*, and say that he took his Dog. So a man may have a Property in Swans. But if the things be *domita natura*, yet a man may have but a Possessory property in them; as if I borrow a horse or other thing for a purpose, I have a special property in it to the purpose for which it is borrowed. And therefore in these cases he that hath the general property, cannot take them away from me against the agreement; and if he do, I may have an Action of the *Cafe* against him for the wrong. And if I borrow a horse to ride to *Dover*, and ride out of the way, yet the owner cannot take his horse from me till I ride my journey; but he may have an Action of the *Cafe* for this exceeding in his journey. And hence it is that in one and the same thing, and at the same time, one man may have the general, and another a special property, as in the cases before; and if one man deliver goods to me to deliver over, he hath the general Property in them, inasmuch as they may be taken in Execution for his Debt; and if they be took away, he may have a *Trover* for them, and so may I also upon my special property. So Lessee for life or years hath a qualified property in the Trees growing on the Land to shroud them, and have the fruit and shadow of them; but the Lessor hath the general property of them. And thus as it seems one may have a general property in a Chattel personal for his life by agreement, as when I hire another mans horse for my money during my life, and in all such cases one of them cannot without doing wrong, deprive the other of his interest in the thing. 17. *Ed.* 4. 8. *Cook* upon *Lit.* 145. 10. *Ed.* 4. 14. 15. *Kelw.* 88. 118. *Cook* 11. 50. *Cook* 7. 17. *F. N. B.* 86, 89. 14. *H.* 8. 1. 12. *H.* 8. 4. 18. *H.* 8. 2, 5. *H.* 6. 55. *Dyer* 306. 8. *Ed.* 4. 5. *Plow.* 524. 21. *H.* 7. 14. 7. *H.* 7. 8.

Trespass.

Action of the Cafe.

Trover.

Sec. 2.
Where, and
by what Act
the Property
of Chattels
shall be chan-
ged, and
gained a-
gainst the
owner, or
not.
By Act of
Law.
Felony,
Waife, &c.
Executor.

Felony.

THE property of Chattels may be altered, either by Act of Law, or by Act of the party. By Act of Law in divers cases by Forfeiture, as goods forfeit by *Felony*, that become *Waif*, *Estray*, *Wreck*, &c. So Goods Attached to bring the party to appear where he makes default, *Dyer*. 338. *Brook Attachment* 10. So by other means, as a *Harriot Custom* after a Tenants death that holds by that Tenure. 8. *H.* 7. 20. So if I marry a Wife that hath personal Goods, by the very marriage the property thereof is in me. 21. *H.* 7. 29. If one take away my goods as a Trespasser, and I sue him, and recover Damages for my Goods, by this he hath gained the property of the Goods. *Kelm.* 62. 63. 58. *Exod.* 21. 35, 36. By Executorship or Administration, the property of the Deceased's Goods are altered, & vested in the Executor or Administrator. And if an Executor pay so much money as he hath Goods, by this he doth gain the property of the Goods. *Kelm.* 62. And if two Executors be, and one of them having only Goods enough to pay the Debts, and he pay them, by this he alone shall get the property thereof. 13. *H.* 4. 2. So it seems also where one doth take away my Goods, with pretence of Title. *Brook Property* 35. But by stealing of Goods only without sale, no property is altered by Law. 4. *H.* 7. 5. So neither by a Sheriff taking of goods in Execution till sale. *Dyer.* 98. 67. So if one borrow or find my goods, or take them from me in jest, as a distress, or the like; this without a subsequent sale in a Market or Fair doth not change the property. *Addition to Inst. Doddridge.* f. 50. *Brook Property*, 27. 26. *H.* 7. 52.

By the Act of the party the Property of goods may be gained and altered many ways; as by gift either in a mans life time, which may be with or without a writing or Deed, or at his death by Legacy, or by sale or Contract, wherein there are many things to be known:

1. The sale must be perfect; and there must be a consideration; but for this, See *Contract. in chap.* *as large.*
2. If it be perfect and well made, and the goods the sellers own goods; If the Contract be made out of any Fair or Market, it is good enough between the parties to change the property, and to pass the thing sold to the Vendee. 3.

3. Yea albeit the Seller know of an Execution against his goods, and be in fear of it, and sell the goods to prevent it. *Addition to Just. Dodr. f. 40.*

4. If a Sheriff sell goods he hath in Execution, the sale is good and unavoidable, albeit the Judgement be after reversed. *Dyer 98. 67.*

5. Sale of any living or dead goods (except horses) in a Fair or Market, on the Fair or Market day, be the goods whose they will, yea although they were stolen, is good to change the Property, and settle them in the buyer; and this sale shall not only bind the parties, but those also that have right thereunto. *Perk. Sell. 93. D. & St. 328.* But herein take these things. *ind. post. 107.*

1. It must be a Sale; and therefore if one sell me mine own Goods, *Perk. Sell. 39.* or a tender Infant, that the buyer may perceive to be within age, or a woman Covert, that the buyer knows to be so (except it be of such things she doth usually deal in, or by her husbands consent) these Sales do not alter the property. *21. H. 7. 40, 23. Eliz. Gibsons Case. Cook Inst. 20. Perk. 713.*

2. It must be a Sale, not a free-gift, without any valuable consideration. *12. Ed. 4. 10. 12. H. 8. 10. Cook Inst. 2. Part. 713.*

3. It must be in a Market or Fair where it is done; for Sale out of a Market or Fair, is not good; or in a place which is so in Reputation, and not in truth, it seems is not good, and so it was held by Justice *Bridgeman. Trin. 3. Car.* And if one, the day before the Market or Fair buy stolen Goods, and give earnest; but he hath time to take or leave till the next day by noon, and then they are brought into the Fair or Market, and then he doth agree, pay his money and Toll; it seems this is not good. *Cook 5. 83. Dyer 99.* *Sec. 3. Sale of goods in a Fair or Market.*

4. The Contract must be made there. *Dyer 99. 121.*

5. The Sale must be *bona fide*; for if there be any Covinous Agreement made between me and another to sell the goods of a third man in a Fair or Market, or I sell them to one that knoweth them to be the goods of another man, this will not alter the property, nor conclude him. *Co. 3. 78. 5. 83. 33. H. 6. 5.*

6. Some have held that the Sale must be on a working day; and that a Sale in London every working day of the week is good,

good, because every day there (but the *Lords day*) is a Market day; and that a Sale, though in a Fair or Market on the *Lords day*, is not good to change the property of the thing sold. 12. *Ed. 4. 8. Noyes new Book. Dyer 12. Cook 5. 83.* But others hold the contrary, and that *Fieri non debet, sed factum valet*; and so it seems it was held in *Comins Case*, in 38. *Eliz. B. R.* and all agreed the parties may be punished for prophaning the day. And I hope the validity of the sale will be yet again disputed; wherefore *Caveat Emptor*.

7. The Sale must be in an open place, and in the usual and proper place for sale of such things. And hence it is that it is held, That goods sold in *London* in any shop used to sell such things, as Plate in a Goldsmiths shop, Cloth in a Drapers shop, their sale is good: But if Plate be there sold in a Scriveners shop openly, or in a Goldsmiths shop or house privately, behind the dores or curtains; or of Cloth in a Warehouse, Backhouse, and not the shop, this sale is not good. *Coo. 5. 83. 4. H. 7. 5. St. 1. Jac. 21. 35. H. 6. 7. Coo. 2. part Inst. 713. D. & S. 149.*

8. They must be the Goods of a Subject; for if the Kings Goods had been so sold, the sale had not been good. 7. *H. 7. 12. 35. H. 6. 39. Plowd. 243. Cook 2. part. Inst. 713.*

9. The Sale must be in the day time, between sun rising and sun set. *Old Book of Entries, 327. Cook Inst. 2. T. 7. 14.*

10. The goods must be free at the time of sale, and not in *Custodia Legis*; for if one steal my goods, and the Kings Officer seize them, and the Officer or other sell the Goods in a Fair, &c. but I prosecute the *Felon*, and thereby he is Attainted: In this case the sale is nought, and I shall have my Goods restored. *Sta. pl. Cor. 365. 21. H. 8. 11. Coo. Inst. 2. p. 714.*

11. Some have held that Toll must be paid, or at least entred upon the sale, or else that the sale is not good. But it seems in all cases, but in case of sale of horses, the sale is good without paying or entring of Toll: And in *Cumini and Bowyers Case*, 38. *Eliz. B. R. Rot. 953.* it was adjudged that a sale of such Goods in any Market or Fair in *England* is good; and the property altered without payment of Toll. See 9. *H. 6. 45. Stat. 2. & 3. Phil. & M. ch. 7. Cook Inst. 2. part 714. 716.*

But

But by the *Stat.* of 34. H. 8. 26. the sale of Goods or Chattels stolen in any Market or Fair in the Dominion of *Wales*, will not change the property there; but the owner upon proof thereof, may have his goods again: but in *England* the Law is otherwise.

12. If the thing sold be a horse beast that is stolen, the sale will not be good, nor property be changed as to the owner, unless there be all these things also done in the case.

1. It must be ridden, led, walked, driven, or kept standing by the space of one hour together at least, between 10 of the clock, and sun set.

2. This must be in an open place, and in the places wherein horses there are commonly used to be sold, and not within any house, yard, backside, or other privy or secret place.

3. All the parties to the Contract there present in the Fair, &c. must come together with the horse to the Toll-taker, or book-keeper.

4. The book-keeper must then write down in his book, the names, sir-names, & dwelling places of the parties to the Contract, the colour, and one special mark at the least of the horse.

5. If any Toll be due, it must be paid, otherwise a penny must be paid for the entry.

6. Either the book keeper, or other chief Officer of the fair or market, must take upon him the perfect knowledge of the seller, both his names, and place of dwelling, which must be entred into the book there, or else the seller must bring to the book-keeper, or other Officer of the fair, one sufficient person, a voucher that shall testify that he knoweth the seller, his true names, mysterie & place of dwelling; and it is said this branch extendeth to the sales of all horses, stolen, or not stolen.

7. Not only the Christian name, sir-name, mysterie and place of dwelling, or Resciansy of the seller, but also of the voucher, if any be, must be entred in the book.

8. The very true price *bona fide* given for the horse, must also be entred into the book; but it seems there need not such a large entry, and no more is required in the entry, but that the Tol or book-keeper, or voucher, did know the parties, &c. for if they say they know, and do not know, yet the sale and

entry is good; but if in truth it be all false that is testified by the voucher, or the book-keeper, in this case the sale is void. But the book-keepers entry *prima facie*, shall be presumed to be true till the contrary be proved, that there is no such person as the seller, owned by the book-keeper or voucher: but it being proved that none such was there at the time of the sale, the sale is void: and all this was agreed by the Court at Gloucester Assises, *Lent. 1649.* by the Lord Chief Baron *Wilde*, *Trin. 10. Car. B. R. Barker and Readings Case.* *A.* brought Trover against *B.* for a horse. *B.* pleaded sale, and Toll paid, &c. *A.* replied there were no such vouchers *in rerum natura.* *B.* Demurred, and it was adjudged for *A.* the Plaintiff upon a special verdict *Stat. 2. & 3. Ph. M. 7. 2. Ed. 3. 15. 5. Ed. 3. 3. 27. H. 6. 5. 31. Eliz. 12.* But all this notwithstanding, a man may without all this care sell in a fair or market his own horse, to which no man hath any pretence of right, & this sale is good.

There are divers other branches required herein by the Statutes of 2. & 3. *Ph. M. 7. & 31. Eliz.* as that Rulers of Fairs must appoint, 1. A set and fit place for sale of horses. 2. A sufficient Book and Book-keeper. 3. That the Book or Toll-keeper shall take his Toll if any be due, between ten a clock and Sunset. 4. Shall deliver his Book to the Ruler of the Fair. 5. That no man shall make a false Voucher, or vouch that he knoweth not to be true. 6. No Book-keeper, as of his own knowledge, shall enter that he knoweth not to be true. 7. That the Book-keeper must give to the buyer, requiring it and paying two pence, a note in writing of the contents of the same bargain under the Book-keepers hand. But these extend not to the prejudice of the sale; for albeit these be omitted, yet the sale is good, and Property changed. And if any stolen horse-beast shall be duly sold according to all these conditions: yet if the owner, his Executor, or Administrator, or any other by his appointment do within six months of the Felony done, claim, and by two witnesses within forty dayes after prove his claim, and that the horse was his within six months before the claim, before some Justice of Peace, in or near the place where the horse is found, and shall pay or offer to pay so much

much money as the buyer gave, or the buyer will depose before the Justice of Peace he gave for the same, the property is saved to the owner, and he may either take him, or have *Detinue, Replevin*, or other Action for him. 31. *Eliz. Cook* *Instit.* 2. 715. 716. 717. 718.

13. If one sell my goods thus, and after he getteth them again, in this case I may take them from him. 34. *H. 6. 10. Co.* 2. *part. Inst.* 713.

14. If Goods be sold not having these conditions in them, so as to binde a stranger, yet the sale is good between the parties themselves. *Cook* 2. *Inst.* 714.

15. And Goods thus sold as before, will change the pro- Persons con-
perty, albeit they be the Goods of an Infant, *Fem Covert*, cluded.
Ideor, one in Prison, or beyond Sea, and such as have the right
in anothers right, as an Executor or Administrator. *D. & St.*
39. *Plow.* 143.

16. If I promise for good cause to deliver another twenty bushels of Corn by a day, by this the property thereof is not altered. So if I buy twenty bushels of Corn of a man for good cause, the Corn not being in bags, or places certain, by this no property is altered. *Kelm.* 77. 69. but if the sale be of Corn in Sacks, or a certain parcel of Corn, *Contra.* 33. *H. 6. 5.*

17. If one Covenant with me that if I pay him 20. l. such a day, I shall have all his Goods in such a place, and I pay him the money, in this case the property of his Goods is altered, and this is a good sale. 27. *H. 8. 16.* But if he sell me the best horse in his stable, and there are more horses then one there, in this case the property is not altered till I have made my Election; and yet if there were but one horse there, *Contra.* *Kelm.* 77. 69. See for this more in Contract.

IF a Lease for years of Land be granted to me and my Heirs, or to me and my Successors, and I dye, my Executor or Administrator, and not my Heir, shall have this Term. *Sett.* 4. To whom the
The same law is, if a Wardship or the next Advowson of a Church be granted unto me and my Heirs; or if a Covenant, or an Obligation be made to me, and my Heirs; for in all these cases this is still a Chattel in me, that shall go to my Executor. *property of*
Chattels doth
belong.
Chattels real
and of a real
nature.

cutor or Administrator, and he only shall take advantage by it; and if my Heir or successor happen to get the Deed, the Executor or Administrator may recover it from him. And if a Lease be made to me for twenty years, without naming my Executors, or Administrators, or Assignes in the Lease; in this case if I dye, my Executor or Administrator notwithstanding shall have it during the Term. *Cook* 10. 87. *Littl. Sett.* 740. *Fitz. Accompt* 56. *F.N. B.* 110. *New terms of the Law, Tit. Assigne.* And if a Lease for years be made to a Bishop and his Successors, and he dye, his Executor or Administrator, not his Successor, shall have it. And if a man be possessed of a Term of years, of land, and grant it by Deed, or give it by Will to me and my Heirs, or to me and my Heirs Males; or devise it by will to A. for life, the Remainder to me and my Heirs; in these cases I shall have these terms of years as Chattels; and after my death, my Executor or Administrator shall have them. *Cook super Littl.* 49 *Cook* 8. 95. 10. 87. *Plow.* 524. And if a man grant a Rent out of his land to me and my Heirs for twenty years, and I dye, my Executor or Administrator, nor my Heir, shall have this Rent. *Littl. Sett.* 740. And if a Rent be granted to me, my Heirs and Executors, during the life of J. S. and for one half year after, and I dye: in this case the half years Rent shall go to my Executor or Administrator, and to my Heir.

And if I be Seised of land in Fee, and make a Lease for years of it, rendering Rent, and then Devise this Rent to a stranger, and the Devisee dye: in this case his Executor or Administrator shall have it. And if Lessee for life make a Lease for years absolutely, this in Law is a Lease for so many years if the life so long live, and shall go to the Executor or Administrator after his death, *M. 7. Jac. C. B. Wats Case.* *Littl. Sett.* 739. *Dyer* 5. *Cook* 7. 12.

If a man be possessed of a Term or Lease for years, and do by Will devise it to one for life, and after to another for life, or for the residue of the years, these Devises are good, and the Devisees shall have it accordingly, and the Executor of him in Remainder after his death shall have this possibility as a Chattel; and he that hath the first estate, cannot bar him of the

the next, but not as a Free-hold; for the quality of the Estate is not hereby changed. But if such a conveyance were by Deed, in this case he to whom the first estate were limited, would have all the whole term; and they that are to come in Remainder, would have nothing. So also such a Devise by will of a Chattel personal, will (as it seems) be void to him in Remainder. But *Quare* of this, and see *Fitz. Devise, Contra.*

But if a man be possessed of a Term, and do Devise it to one, and the Heirs of his body, the Remainder to another, this Devise is void to him in Remainder, and the first Devisee and his Executors shall have it all the time. And if he Devise it to one and his Heirs, the Devisee hath no Free-hold, but it shall go to his Executors as a Chattel. *Cook* 8. 95. 10. 47. *Plowd.* 525. *Dyer* 358. *Brook Chatt.* 23. *Cook* 10. 87. *Watts & Goldsborows Case.* M. 19. Jac. C. B.

If a man be possessed of a Term, or Lease for years of land, and grant a Rent-Charge out of it to *I. S.* for his life, or in Fee, this is a good Grant, and the land shall be charged during the Term only. *Cook* *Super Lit.* 147.

If one that hath a Lease for years enter into a Statute, and execution be sued thereupon, and the Sheriff extend the Lease, and deliver it to the Conusee at a yearly value, as he may either sell it outright, or extend it at a yearly value, which he will; this is no *Franck-Tenement* in the Conusee, but a Chattel still.

If a Termor grant all his estate to *A.* to the use of himself, and his wife for their lives; In this case neither the Termor or his wife hath any Free-hold; for the Statute of 27. doth not execute the possession to this use. And therefore if he or his wife grant this to another, their Grant is void, for the whole interest in Law is in *A.* *Dyer* 369. If a Lease be made to *I. S.* for forty years, if he live so long, and if he dye within the said Term, that his wife shall have the residue of the Term; now this is no Free-hold, and by the death of *I. S.* the Lease is ended; and therefore the Remainder to his wife is void. *Dyer* 253.

A man may have an estate of Free-hold or Inheritance in other things, as well as Lands, Rents, Commons, and such like, as in a Robe, a Garment, Bread, or Drink, or the like.

If Land or Rent be granted to one and his heirs, during the life of *I.S.* in this case after the death of the Grantee, his Heir, not his Executor shall have it. *Lit. Sett.* 739. And regularly all other things which are not forfeited by an Outlawry in a Personal Action, nor Attachable in Assise, nor distainable for Rent, or the taking away whereof will be no *Felony*, they are not to be reckoned Chattels that shall go to the Executor. 20. *H. 7. 13. Kelm.* 118.

Of Trees.

If one seised of Land in Fee, make a Feoffment of it to me, excepting the Trees, and after grant me the Trees for years; in this case the Trees are a Chattel in me and my Executors; I shall have them. And if one seised of land in Fee, sell the trees, or sell the land, excepting the trees, these it seems are chattels personal; and if the Vendor dye, in the first case the Vendee shall have them, and the Vendor shall have the trees excepted in the last, albeit they be not cut down; and if in the last case he grant the trees, the Grantee shall have them. *Cook.* 11.50. *Perk. Sett.* 58. *Cook.* 4.63.

If one Lease me his land for ten years, and after Lease me the trees for twenty years, after the Lease for ~~twenty~~ years ended; I shall have the trees as a chattel. *Cook.* 4.63. *Perk. Sett.* 58.

If one be seised in fee of lands whereon there are trees growing; and he make a Feoffment of the land to me, excepting the trees, and afterwards he doth sell me the trees for ever, and after I dye; in this case my Executor or Administrator shall not have these trees, as they shall in case where the Feoffer doth grant them to me for years. And if I be seised of land in fee, and I make a lease for life or years of it, excepting the trees, and afterwards I dye; in this case my Executor or Administrator shall not have these trees, but they shall go in both cases with the land. *Cook* 4.63. 11.48.

If a Lease be made for life or years, of land whereon a house is standing, or Timber is growing, and the house is prostrate, or the Timber is cut or fallen down, (by whomsoever, or what means soever it be) the materials of this house, and this Timber is now become a chattel; and therefore if the Lease be without impeachment of Waste, it shall go to the Lessee, and after his death to his Executor or Administrator; but if the

the Lease be otherwise, it shall go to the Lessor, and after his death to his executor or administrator, But if the timber be cut for reparation only, or the Lessee will imploy the materials of a house to build it again, and the Lease do continue, it may be so imployed, and then the executor or administrator of the Lessor may not take it. *Cook* 4. 63. 11. 81. 84.

If one be seized in fee-simple of ground whereon Trees do grow and he sell me these trees for money, and afterwards I dye before they be cut; in this case my executor or administrator shall have and may cut them. *Cook* 11. 50. *Perk. Sect.* 58. And if one seized of Land in Fee makes a feoffment thereof to me excepting the Trees, and after grant me the Trees for years; or if he make me a Lease of the land, first for years, and after doth grant me the Trees for a number of years to begin after the end of the term of the Land; in both these Cases I have the trees in the nature of a Chattel; and if I die, my Executor or Administrator shall have them. The Deer, Conies, Pheasants, Partridges, and the rest of the game of a Park shall go with the Park, as parcel of the freehold, and not to the executor. *Cook* 7. 17. 22. *Ed.* 4. 7. 3. *H.* 7. 15. 10. *H.* 7. 6. The fish of the pond must go with the pond, the pigeons of the house with the pigeon-house, and not to the Executor. *Kelw.* 118. 18. *Ed.* 4. 8.

The Incidents of a house, as glass windows annexed with nails, or otherwise to the windows, the wainscote fixed by nails, skrews, or Irons put through the posts or wals, tables dormant, furnaces of Lead and Brass, and fats in a Brew and Dyehouse standing and fastened to the wals, or standing in, or fastened to the ground in the middle of the house, (though fastened to no wall) a Copper or Lead fixed to the house, the doors within and without, that are hanging and serving to any part of the house, shall not go to the Executor or Administrators to be divided and sold from the house, albeit the Executor or Administrator have a Lease for years of the house, and by that means hath the house also. But if the glass be from the window, or there be wainscote loose, or doors more then are used, that are not hanging, or the like, these things shall go to the Executor or Administrator. *Ceo.* 4. 63. 21. *H.* 7. 26.

Wild fowl and
Beasts.

So

So pales, rails, fixed walls, stakes, posts, Millstones, anvils, locks and keyes of doors, glaſs, go with the houſe to the owner thereof, and ~~not~~ to the Leſſor when the Leſſees time is out, nor to Executors when a man dies; and it matters not at whoſe charge they may be made or ſet up; they are as the trees, parcel of the inheritance. *Coo.* 17. 63. 64. 21. *H.* 7. 20. *Coo.* 4. 65. And yet perhaps a furnace ſtanding in the middle of a houſe, and not fixed to a wall, nor ſtrengthening the houſe, may be taken away by a Leſſee during his term without doing waſt; yet is it not to be reckoned amongſt moveable goods attachable, or to be taken in execution. So of a Copper fixed to a wall, with looms and pricks for a Clothiers uſe. 37. *Elix. Auſtins* Caſe.

Charters and writings.

Thoſe writings which concern the inheritance, muſt go to the heir, and as it ſeems the boxes wherein they are, eſpecially if they be ſealed, not to the Executor. But thoſe writings which concern goods or Chattels, and the boxes, ſhall go to the Executor, and not to the heir. But the Cheſts or Trunks wherein writings are, eſpecially if they be open, ſhall (as ſome ſay) go to the Executor; and yet if they be locked or ſealed and full of writings, and there are other things in them, others ſay the contrary. 41. *Ed.* 3. 2. 36. *H.* 6. 26. 18. *Ed.* 3. 4. 3. *H.* 7. 15. 22. *Ed.* 4. 7. *Br. Chat.* 12. *Fitz.* Executor. 111. *Broo.* Executors 145. 97. If *A.* mortgage the inheritance of land to *B.* upon condition of redemption, by payment of five hundred pound to *B.* his heir or Executor, and *B.* dyeth, the heir, not the Executor ſhall have the Deeds. And if Land be ſold for five hundred pound, to be paid to *A.* but a condition, that if not paid to him, his heir or Executor by ſuch a day, then to re-enter; *A.* dieth; in this Caſe the heir ſhall have the Deeds. If writings be pledged or granted to me, and none of the land to which they do belong, it is in the nature of a Chattel, and my Executor, not my heir, ſhall have them. 21. *Ed.* 4. 19. 8. *Ed.* 4. 3. *Br. Chat.* 12.

Se& 5.
Emblements,
to whom they
do belong,
and who ſhall
have them.

EMblements ſtrictly are the profits of Land which hath been ſowed (which in ſome Caſes he that ſoweth the Land ſhall have, and in ſome Caſes not) But the word is ſometimes uſed more largely for any profits that ariſe and accrew naturally

naturally from the ground, as grass, fruit of trees, hemp, flax, and the like. *Termes ley Kelw.* 125. *Coo. super Lit.* 55. If Tenants in fee-simple or fee-tail sow the Land, their executors after their death, if they dye before cutting, not their heir shall have the emblements. *Merton. cap. 2.* 37. *H.* 6. 25. If one have land in fee-simple, or otherwise, in his own or wives right, or be estated in land for years in the right of his wife, and he sow it with Corn, and dye before it be reaped; in this Case the executor of the husband, not the wife or heir, shall have it. And so it seems of planted hops, saffron, and hemp, *quicquid plantatur solo, solo cedit.* But grass, apples, pears, and other fruit upon the trees, though ripe and ready to be cut, shall go to the heir with the land. But all these of both sorts, if the land in which they grow be sold away, and not excepted, pass with the land; the roots of carrets, turnips, parsnips and skirrets are disputable. *New book of Executors.*

If a disseisor, or a disseisor of a disseisor, or a feoffee, donee or lessee of the first or second disseisor sow the land, and cut and carry the Corn away, or cut and carry away the grass or trees, or gather and carry away the fruit, as apples, nuts, or the like, or give or sell away any of this (unless it be in a market or fair, &c.) yet when the disseisee doth re. enter, he shall have it all again, and may take it wheresoever he doth find it, for the property of it is still in him; and if he dye, his executor may do the like. And if they be gone or spent, the disseisee may have an Action of Trespass for them against the disseisor, but not against his lessee, feoffee or donee, which come in by title. *Cook* 11. 51. *Dyer* 32. 173. 12. *H.* 7. 25. *Perk. Sect.* 519. *Cook* 5. 85.

If a Tenant for his own or anothers life sow the land, and after dye, his executors and not him in reversion shall have the Emblements. And so is the law for any particular tenant that hath an estate uncertain. But if a tenant for years sow the land, and before that he hath cut and severed the emblements from the land, his term expireth, there the lessor or he in reversion, and not the lessee or his executors, shall have the emblements. But if lessee for years of the tenant for life sow the land, and the lessee for life dye before he can reap,

Q

yet

yet the Lessee for years shall have the crop. So if a man seized of lands in fee, hath issue a daughter, and dieth, his wife being enfeint with a son, and the daughter soweth the ground, and after the son is born, yet the daughter shall have the emblements. 10 *Ass. p. 6. Lit. Sect. 68. 7.H.4.13. Cook 5. 106. 7. Ass. p. 19. Dyer 316. 16.H.6.6.*

If a woman copyholder during her widowhood, according to the custom of the Mannor soweth the land, and before the severance of the emblements she taketh a husband, the Lord shall have the emblements. So if she make a lease for years, and the Lessee sow the Land, and then she take a husband, there the Lord, not the Lessee shall have the emblements, though the Lessee's estate be determined by the act of a stranger. *Cook 5. 106. & Super Lit. 55.*

If a lease be made to the husband and wife during the coverture, and the husband soweth the land, and after they are divorced *causa pracontrahitis*, the husband, not the lessee, shall have the emblement. If the wife have a lease for years of land as executor to a former husband, and her present husband sow it, and dye; in this Case the Corn, at least so much as is more then the value of the land shall go to the wife, not to the executor of the husbands. *New book of Executors.* If one seized of land in the right of his wife in fee, or for life be, and he or his lessee for years sow the land, and before the corn be cut the wife dye, or the husband die; now in the first Case the husband or his executors; and in the last the lessee, or his executors, if he die, shall have the emblements. But if husband and wife be joynt tenants of land, and the husband soweth the ground, and the land doth survive to the wife, here it seems she shall have the Corn, and not the executors of the husband; but the husband might have given or disposed them. 7 *H.4.17.7. Ass. p. 19. Brook Embl. 6. Cook super Lit. 55. 8. Ass. 21. Dyer 316.* Where one doth enter into Land by a right paramount, or the Lease or estate doth determine by the act of the Lessee, or by his means that did sow the land, or by the means of him under whom he claims; in this case although the estate of the Lessee be uncertain, yet he shall not have the Emblements. As if one enters

enter upon or recover land sowed by vertue of a condition in Law or in Deed; as if the Lessee for life or years do alien in Fee, or commit waste, and he recover the land; or a Feoffment or Lease be on condition, and the condition be broken, or the Lord of a Copyholder enter for a forfeiture of the Tenant, or a Lord enter on his Villains land, or the King or Lord enter upon the land of his Tenant after a felony done, for a forfeiture: in these and such like cases he that entreth upon or recovereth the land, shall have all the emblements that are growing and not cut upon the land at the time of his entry or recovery. So if a man recover land by a suit upon a right, and be put in possession by an *Habere facias seisinam*, or *Habere facias possessionem*, he shall have all the emblements that shall be then growing upon the land. *Fitz. Trespass. 254. 44. Ed. 3. 25. Cook 5. 106. & sup. Lit. 55. Coe. 4. 21. Perk. Sect. 515. 40. E. 3. 5. 19. H. 6. 45. Sta. L. 3. 301. Coe. 5. 111. Broo. Em. 8.*

If husband and wife be joyne-tenants of land, and the husband sow it and dye, it seems the wife shall have it; and yet the husband might have disposed it in his life time.

And yet if a Feoffment be made upon a condition, and the condition is broken, and the Feoffee before the entry of the Feoffor cut the corn sowed on the ground, and after such severance the Feoffor re-enter; in this case not he, but the Feoffee shall have the Emblements: but if he had entred before, he should have had it. So if a Copyholder after forfeiture, and before entry of the Lord, cut the Corn, he shall have that which is cut. *5. H. 7. 17. Broo. Emblements 4.*

If a man Lease Land at will, and the Lessee doth sow the Land to corn, or set roots, or sow hemp or flax, or any yearly profit; and then the Lessor determine the will before it be ripe, and oust the Lessee: now in this case the Lessee shall have the Corn, and if he dye his Executor shall have it. But if the Lessee himself determine the will, he shall not have the Emblements, but the Lessor. And if such a Tenant at will plant young fruit trees, or young Oaks, Ashes, Elms, &c. or sow the ground with Acorns, &c. he shall have no profit of these, for this doth not bring any yearly profit. So if he or any other Tenant that shall have Emblements do only ear

and dung the Land, they shall have no benefit by this. *Cook*, 5. 116. & *super Litt.* 55. 18. *Edw.* 4. 18. *Litt. Sell.* 68.

If a Tenant by Statute-Merchant soweth the ground, and then a sudden and casual profit happeneth, by which he is satisfied, yet he shall have the Emblements. 44. *Ed.* 3. 15. *Cook*, *super Litt.* f. 55.

If Tenant at sufferance be discharged, and notwithstanding he continue in possession, and sow the land, and the Lords Bailiff takes the Rent at our Lady day after, and payeth it to the Lord in a gross sum with other monies; now it seems in this case the Tenant, and not the Lord, shall have the Corn at harvest. *Crompt. Jur.* 215.

If a man under colour of a Feoffment or Lease presuming he hath a good estate, when in truth he hath none, sow the land; now in this case neither he nor his executor, but the Feoffor or Lessor shall have the Emblements. *Lees Case*, 9. *Lac.*

If two be Tenants in common, and one dye, and his wife hold in common, and sow the land, and dye; the other Tenant in common or the heir shall not have it, but the Executor of the woman. *Perk. Sell.* 523.

If a Lease be made to a husband and wife at will, and they be afterwards divorced *causa pracontractus*, and the Land be sowed before; now in this case the Husband, and not the Lessor shall have the Emblements. *Cook* 5. 116.

If a Tenant in dower sow her Land, and dye before severance of the Corn, the heir shall not have it, but the Executor of the wife: And if after the sowing she take a husband, and he dye before it be cut, his Executors shall not have it, but the wife shall have it. *Stat.* 20. *H.* 3. c. 2. *Perk. Sell.* 522. *Broo. Embl.* 26.

If a feme sole sow her land, and after marry, and he dye before severance, the wife, not the Executor of the husband, shall have it. *Broo. Embl.* 26.

If a Parson dye before the first of *May* when the Land is sowed, and another Parson is made, the successor shall not have the Tenth, but the Executors or Administrators of the first Parson. But if he dye before the conception of the Virgin *Mary*, the successor shall have the Tenth of the Emblements. But now by the Statute of 28. *H.* 8. the profits are to be

be sequestred from the death of the Parson, and to be delivered all to the successor, only the Corn sowed upon the Glebe land by the predecessor, which he may dispose of by will; and if he do not, it seems his Executor shall have it. 21. H. 6. 30. 34. H. 6. 33. 35. H. 6. 39. 28. H. 8. cap. 11.

If a man be Outlawed in a personal Action, the King not the party, or his Executors if he dye should have all the Emblements on his ground at the time of the Outlawry. So if a man forfeit his goods in case of Felony by flight, though he be after acquitted, or being convicted, the King would have had all the Emblements at the time of the flight in the first case, and felony done, in the second case; or at any time after (as it seems) until conviction or acquittal. F. C. 344. 5. H. 7. 16.

It Corn be reaped, and the Tithe not set out, and the inheritor of the Tythe dye, it seems the Executor, not the heir of the inheritor, shall have the Tythe. *New Book of Executors.* But note, that in all these cases where a man hath right to emblements, and dyes, if he make any Devise of them, then they shall go according to his will and disposing. *Dyer* 316.

And in all these cases before, he to whom the Law doth give the Emblements, may lawfully enter into and upon the land or ground where they grow, and cut and carry them, and he is not put to his Action for them, nor bound to take them ere they be ready, or at one time; but the Law doth give him convenient entry of ingress, egress and regress. And if he be disturbed in this way, he may have his Action of the Case, and shall recover as much as he is damnified. *Quando* Action of the Case.
lex aliquid alicui concedit; concedere videtur & id sine quo res ipsa esse non potest. And if a man that hath right to these Emblements have any Trespas done to him in them, he may have an Action of Trespas for it. *C. sup. L. 56. Ke. 123. K. f. 160.* Trespas.

The Executor or Administrator of a woman that hath a husband, shall have by right of his Executorship or Administration, all Actions, Rights and Titles to any Chattels and possibilities, and things of that nature which the wife had before the marriage, and which fell to her during the marriage; for these things the husband shall not have by the intermarriage after the wives death, as he shall have all the rest of her goods Husband and Wife. Executor.

and Chattels, except he have them as Executor or Administrator to her, as he may be. And if such a woman have any Goods or Chattels as executrix to another, her executor or administrator, not her husband, shall have these also, for she hath these goods in anothers, and not in her own right. *Cook super Lit.* 351. *Plow.* 294. 197.

If I have any Goods or Chattels in joynt-tenancy with another, as if a Lease be made of Lands to me and another for years, or a horse or other Chattel personal be given or granted to me and another; in these cases if I dye, my executor or administrator shall not have any part of these Goods or Chattels, but the other surviving joynt-tenant shall have them all. But otherwise it is of the Goods and Chattels that I and another have in common. And therefore if I and another have Goods and Chattels in that nature as before, and he or I grant that which doth belong unto us thereof unto a stranger; in this case the stranger and him of us two that hath kept his part, are Tenants in common of the things; and therefore if either of us dye, the part of him that dieth in the goods and Chattels shall go to the executor or administrator, and not to the other Tenant in common. *Lit. Sect.* 281. *Perk. Sect.* 525, 526. *Lit. Sect.* 320, 321.

If I have a Judgement for land in a real or mixt Action, and for dammages recovered in the same suit, and I dye; in this case my executor or administrator, not my heir, shall sue execution for, and recover the dammages, but not for the land. So if I recover dammages against another for the detaining of my Charters, and dye; my executor or administrator shall recover the dammages; but the heir shall have the Charters, and the heir must sue his *Scire facias* for the Charters ere the Executor can sue for the dammages. Also if I recover any debt or damage in any personal Action, my executor or administrator shall recover and have this. *Fitz. Executor.* 53, 84, 117.

If I have the inheritance of Land whereof there is a Lease for years, and the Lessee grant his Lease to my wife and *I. S.* and after she dye, now I shall not have this term, but *I. S.* for the term was not drowned. But by a Feoffment or new

new Lease, I might in her life time have given away her interest. *Plow.* 418.

If two femes sole be joynt-tenants of a term, and I marry one of them, and she dye, now the other joynt-tenant, and not I, shall have the whole; but if it had been a personal Chattel, *contra*; for the joynt-tenant hath the elder title. *Plow.* 418.

So if a term be granted to my wife and a stranger, or were granted to my wife while she was sole, and a stranger, and she dye; in this case I shall not have her Moity, but it doth survive and go to the stranger. *Plow.* 418.

If a man be posselt of a term of forty years in the right of his wife, and make a Lease for twenty years, reserving thereupon a Rent, and then dye, though the executors of the husband shall have the Rent, yet the wife shall have the residue of the term after her husbands death; for a disposition of part is not a disposition of the whole. But if there were a clause of re-entry for non payment, she may not re-enter by this. So if a Lease be made to them two for years during the coverture, and he do not dispose it in his life time by act executed, the wife shall have it all. And regularly that which her executor or administrator shall have after her death, she shall have after her husbands death, as all the Goods and Chattels she hath in *auter droit* not disposed by her husband; all Chattels real consisting meerly in Action, all Chattels personal also consisting meerly in Action not recovered by him in his life time. *Cook super Litt.* 46. 351. *Plow.* 294.

If an Estray happen within the Mannor of the wife, if the husband dye before seisure, the wife, and not the executors of the husband shall have it; for the property was not vested in the wife till seisure. 10. H. 6. 11. 43. *Ed.* 3. 8.

If a Rent be granted to a man or woman sole for one and twenty years, if the grantor shall live so long, and after they intermarry, and then arrearages incur, and then the husband dyeth, and then more Rent is behind; now the wife, and not the executor of her husband, shall have the arrearages before and after her husbands death. *Curia B. R. Burgess Case.* Hill. 22. Jac. 33. H. 6. 20. 39. *Ed.* 3. 19.

If a husband be seised of Rent in the right of his wife, and.

and the Rent incur, and the husband dyeth, the wife and not the executors of the husband shall have the arrearsages; per three Justices. *B. R. 22. Jac. Hill. 9. H. 6. 43. 29. Ed. 3. 40.*

If a Lease be made to a husband and wife for term of their lives, the remainder to the executors of the survivor of them, and the husband dye, the wife and her executors shall have it; and this the husband could not grant away from her, because it is but a possibility and no interest. *Hill. 7. Eliz. B. R. Cook super Litt. 46.*

If they two get a Judgement against a man for damages, and he dye, the wife shall have all the damages. *48. E. 3. 12.*

If an obligation be made to them two during the Coverture & he dye, she shall have it, & not his executors. *3. H. 6. 37.*

If husband and wife have a Mannor to them, and the heirs of the husband and Tenant by Knights service dyes, his heir within age, and after the husband dyes, the wife, and not the executors of the husband, shall have the wardship. So of a Presentment to a Church. *1. Mar.*

Sec. 6.
Paraphornalia
or Parapher-
nalia, what it
is.

THE word *Paraphornalia* is used in our Law, but in the Civil Law the thing is said to be *Paraphernalia*, which by the Civilians is said to be something which the wife hath to her self besides her dowry which her husband gave her; the which she must have, and not the executors of the husband, and of which the wife may make a will without the assent of her husband, as being a thing in the free disposition of the wife. And this both by the civil and common Law is all the necessary furniture and apparel of a womans body provided her by her husband, which may extend to many garments of the same kind, and is not to be restrained to one garment only, which yet is sufficient to cover the body, and yet not to be extended to that which is above her degree. And therefore Jewels and Chains of gold and silver shall not be esteemed *parapherna* for a husbandmans wife, but these may be *parapherna* for the wife of a Nobleman. But what shall be allowed for *parapherna*, is to be decided by the Judges, and they do use to give a greater allowance where are no Debts of the husband to pay, then otherwise. And *omnia hac bo-*

na mulieris are said to be *privilegiata*, & *de paraphernis non debet maritus intromittere in vita uxoris*. Neither may he Devise them at his death. And as touching these it is out of question, that if the husband dye, the wife, and not the executor or administrator of the husband shall have them, and that with the consent of her husband she may make a Testament of them, and Devise them. But not otherwise, as it seems by our Law, because the property and possession is in him. And yet by the Civil Law she may Devise them, and make an Executor of them without the husbands consent, 18. *Ed. 4. 11. 12. H. 7. 23. 33. H. 6. 31. M. 27. 28. 2. Scaccar* the Lord Treasurer and other five Executors of Viscount Binden against Viscountess Binden. *Fitz. Exec. 24. Fitz. Exec. 19 37. H. 8. 28. Fitz. Admin. 7. Broo. Administ. 31. 33. H. 6. 31. Broo. Test 13. 18. Ed. 4. 11. 12. H. 7. 23. 24.*

Cook 1. 252.

If the husband and wife be Ejected of a term which the husband hath in the right of his wife; and the husband bring an *Ejectione firme* in his own name (as he may) and recover it; now by this the term is altered, and is become the husbands own in his own right, and after his death shall go to the Executor of the husband, and not to the wife. *Plow. 415. 37. Ass. pl. 11. Coe. super L. fol. 46. b.*

If the husband grant the whole term upon condition that the grantee shall pay a summe of money to his Executors, and the husband dye, and the condition is broken, and the Executor enter, now this is a disposition of the term, and the Executor shall have it. *Coe. super Litt. f. 46.*

The rest of the Cases that follow, wherein an Action of the Case doth lie, they arise for the most part upon Deeds as well as words, and not upon words only. And the Action is given against a man sometimes for not doing something he should do, and is bound to do. And sometimes it is for not doing it as he ought to do. And sometimes it is for doing something a man ought not to do. And amongst these a man is bound to do something by Law without a special undertaking, and something he is bound to do by his own engagement, and this is called an Assumpsit.

CHAP. XVIII.

Of an Action of the Case upon an Assumpsit.

Sect. 1.
Assumpsit
what it is.

AN Assumpsit is nothing but a voluntary promise made by word of mouth only, by which a man doth assume or take upon him to do or pay any thing to another. *New Terms of the Law.*

If it be in writing and by a Deed, it is of another consideration, we meddle not with this. But an Assumpsit seemeth to differ from an agreement but as the *Genus* and *Species*. For an Assumpsit is but a special kind of agreement, and every Executory Contract hath an Assumpsit in it. *Cook* 444.

There are two considerable parts of it; The consideration of the Assumpsit, and the Assumpsit or promise it self.

This Action of the Case upon an Assumpsit (as the contract) is either expresse, as when one for good cause doth promise that himself or some other shall pay money, make a house, seal a bond, make a lease, or the like; or implied and supplied by the Law, as in every Executory contract there is an Assumpsit implied. *Coo.* 5. 19. 4. 94. 49. *Plow.* 308.

They that are expresse, are also absolute or conditional: and these are also some of them, such as have a consideration called *Quid pro quo* in them; And some of them are without consideration called a bare or naked promise, which is where a man bargaineth or selleth his lands or goods, or promiseth to give one money, or a horse, to build a house, or do any thing by a day, and there is no recompence appointed to him for the doing thereof; this is void, and no Action lieth for the not doing thereof; for the rule is, *ex nudo pacto non oritur actio*. Also these Assumpsits are either real or personal.

Sect. 2.
What shall be
said a good
implied Assumpsit, or
Assumpsit in
law, on which
an Action
will lie, or
not.

IF I intreat one to be bound for me, there is in this an implicit Assumpsit that I shall save him harmless; and upon this if he be molested, he may have this action. 2. *Car. per. Just. Richardson* at *Northampton Assizes*; for the Assumpsit is implied.

If any goods besides money be delivered to one to deliver over to another, or to the use of another, or to be employed

to any other purpose; or on condition, that if he do such a thing he shall keep them; in all these and such like cases some think there is an Assumpsit implied, upon which this Action will lie in Case of breach of the trust. *Dyer. 21, 22, &c.*

If I bid one do work for me, and do not promise any thing, the Law makes it, and he must say it was worth so much, and that w^{ch} he deserves is recoverable in this Action. *Trin. 8. Car.*

Every executory contract doth imply an Assumpsit. So every debt that is not upon a specialty (or for rent upon a Lease) but which may be turned into damage, as upon an account, or upon a buying, or an agreement, hath an implied promise, and the plaintiff may say that the defendant did promise to pay it, and make the debt the consideration. See divers Cases *infra*.

An executor cannot be charged in account for any receipt or occupation by the deceased, nor in debt upon the contract of the deceased, but an Action of the Case it is thought will lie in the first, and it is clear will lie in the last Case, upon the implicit contract. *Coo. 4. Coo. 8. 94. 133.* As if one receive my money to account, and he and I cast it up and agree in certain what is due, and then he dye, in this Case it seems I may have this Action against the executor, or administrator; albeit I cannot have an account. *Hil. 13. Jac. per Ch. Justice.*

A bare submission to an Award, without any express promise, is sufficient to yield this Action upon the Assumpsit in Law. *Adjdg. Neales Case. M. 37. 38. Eliz. B. R.* and in *Trin. 18. Jac. B. R. Broome's Case.* And so in divers other Cases.

A Stouching this point, the manner and the matter is considerable; as to the manner, it matters not in what form words the Assumpsit is made, so the sense be clear; And therefore if one promise me twenty pounds when I have done a work, or to do a work, or if I do a work, or so as I do a work; All these are good Assumpsits. *Plow. 5. 305.* So if one promise me twenty pounds if I marry his daughter, or with the marriage of his daughter, these are good. *Plow. 305.* or if you will satisfy me, I will do such a work.

As to the matter, it is considerable together or apart. Together;

Sec. 3.
What shall be said a good express Assumpsit, on which this Action will lie For the manner.

Assumpsit im-
perfect.

gether; And as to this, this must be known. 1. That the whole agreement must be consummate. If *A.* and *B.* agree that *A.* shall lend *B.* twenty pounds for a time, and for this, that *B.* shall mortgage to *A.* such land upon request; and after *A.* upon request of *B.* deliver wages to *C.* for part of this twenty pound, and hereupon *B.* doth promise to accept it for part of the money, or to redeliver it to *A.* upon request, this contract is perfect and good to give Action. *Old B. of entries. F. 4.* So if *A.* ow *B.* one hundred pounds, and *C.* being a Clothworker to *A.* having Clothes of his in his house, and they three agree that *B.* shall have these Clothes for his money, and that *C.* shall deliver them, this is good, and sufficient. Adjudg. So one possessed of a field of Corn agreeth with another, that he shall have all the Corn there for twenty pounds, to be paid him at *Michaelmas* next. *Co. 4. 92.* But if the agreement be only in inchoation and not perfect, no Action will lie upon it. And therefore if two speak together about an agreement, and they in the midst of their discourse break off, and say they will talk further of it to morrow, no Action can be brought upon any of the conference of this day. See contract. Chap. 15. *Sett. 4.*

If two be in speech about marriage between their children, and one say to the other, I intend to give my daughter one hundred pounds to him that shall marry her with my consent, this is imperfect. 2. It must be sensible and certain.

If an agreement be between me and another, that for ten pounds paid he shall give me a horse, or a watch such a day, this is good and certain enough. *Fitz. Debs. 89.* So if the agreement be, that he for good cause shall make good such a house, this is good, and shall be taken for repair of it. *M. 2. Jac. B. R.* So if the agreement be about a horse for twenty shillings in hand, and ten pounds more to be paid at the death or marriage of the buyer, for which he shall become bound with sufficient surety by their writing obligatory, that for this the seller will deliver the horse upon request, this is certain enough and good. *Hob. Rep. pl. 79.* But if the agreement be such as cannot be made certain and sensible, it is void. And therefore if the agreement be to save harmless, and

Assumpsit in-
sensible and
incertain.

and not for what, or against whom; this is void. So if it be agreed between *A.* and *B.* that *A.* shall keep *B.* without damage against *I. S.* for ten pounds, in which the obligée is bound to the obligor; or if the Assumpfit be that *A.* shall pay to *B.* his part of the summe of moneys that shall be levied for the trying of the customes of *M.* these are all insensible and voyd; on which no Action will lie. See *Coo.* 10. 102. 76. *Dyer.* 356. 3. It must agree. If one in consideration that I have given and delivered to him one horse, and have promised unto him that upon twenty pounds paid to me I will deliver him such an Indenture, and he assume to pay me this twenty pound at *Michaelmas*; this is not repugnant, but good, to give Action for the twenty pounds at *Michaelmas* if not paid. *Coo.* 5. 37. But if the agreement be repugnant and contrary to it self, it is void. If it be agreed between *A.* and *B.* that *A.* shall do such a work, and *B.* shall pay so much for it, but *A.* shall not sue for the money; this is void, and will not binde on either side before the work be done. But after the work is done it may perhaps bear an Action. *Quere* 7. *H.* 6. 44. 21. *H.* 7. 24. 30.

In the matter considerable apart, there are three things to be considered. 1. The persons to the Assumpfit, and for or against whom this action doth lie. 2. The cause or consideration of it. 3. The promise it self.

As touching the persons to the Assumpfit, these things are to be known. 1. The persons that do promise must be able in Law to contract; otherwise the promise will not binde; and therefore regularly the Assumpfits of Infants, women that have husbands, and such like, do not binde; yet generally promises made to them are good. But see how and more of this point in Contract before. 2. A promise to the wife is all one as if it were to the husband; and therefore if one say to my wife that if I will let *A.* out of prison being there in execution for a debt owing to me, that if the prisoner pay it not to me by such a day, he will pay it, in this case I alone without my wife may sue him. 27. *H.* 8. 24. 3. If a promise be made to my servaht to my use, Servant.

Sec. 4.
In respect of
the persons to
the contract.
Women co-
vert.
Infant.
Non compos
mentis.

Stranger.

Executors.

Assumpsit by
two or more
to a person
in certain.

I may have an Action upon it, and suppose it to be made to my self. *M. 36. 37. Eliz. B. R. Jordens Case*. But of this and of contracts made by or with servants for their masters, enough already hath been spoken. But otherwise it is of contracts made with a stranger to my use; and therefore if there be mother, son, or daughter, and the mother having a Joynture on her sons Land, the son in consideration that his mother doth surrender, doth assume with her to pay the daughter one hundred pounds at a day; in this Case the daughter (at least in a Court of Law) cannot sue for this hundred pound, but the mother must sue for it. And yet it is thought the daughter may sue in a Court of equity for it. *Adj. Trin. 18. Jac. B. R.* If one in consideration that I have paid him ten pounds, assume to a stranger to assure me an Acre of Land, no Action will lie for me at Common Law upon this. But in a Court of equity happily I may have relief. *Jolleys Case. Pasch 9. Jac. B. R.* by three Judges. 4. This Action lieth for an executor or administrator, upon a promise to the deceased. And if a man promise to pay money, or to pay that which is in the nature of a debt, or where the ground is a true debt, and he die before it be done, the executor or administrator shall be charged with it. *Hob. Repl. 278. Co. 9. 68. Plow. 182.* But otherwise it is when it is to do some Collateral thing, as to build a house, or the like, or when it is to pay money in consideration of some Collateral thing, as in consideration of the enlargement of a man out of prison, or the like. And upon this difference it hath been oft adjudged. *Trin. 3. Jac. B. R.* yet see *Cook 10. 77.* That for the Assumpsit of the Testator to pay a debt or perform a duty, an Action of the Case lieth against the executors. *N. book of Entries F. 1. 2. 5.* If an Assumpsit be made by two or more, they must be sued together, and one of them cannot be sued alone, as long as the rest live. But if one of them die, the rest may be sued alone. *M. 7. Jac. B. R. curia.*

If another and I be speaking about marriage between his daughter and my son, and in conference I use these words, *That I shall give him one hundred pounds that shall marry my daughter with my consent*, no Action will lie upon this, though
he

he do after marry my daughter with my consent. *Pasch. 3. Jac.*
B. R. Goldsmith ver. Weston.

TO make the cause or consideration of an Assumpsit good, Sec. 5.
 it must have all these qualities. 1. It must be valuable, In respect of
 that is, it must import some gain to him that makes the pro- the cause or
 mise, or (at the least) some loss to him to whom it is made, consideration.
 or both. But the proportion of the value is not considerable;
 for a penny, or pint of wine, will as much engage a promise
 of one hundred pounds, as more. *Hob. Rep. pl. 6. 7. Trin. 7.*
Jac. B. R. Friends Case. Co. 10. 102. 76. but in that Case the
 Jury will probably give dammage accordingly as the cause is.
 And the Law is all one in this when the contract is in a writ-
 ting, or a writing sealed & not delivered. But if it be in a writ-
 ting sealed and delivered, as a bond or bill, there the conside-
 ration is not at all material. *Fitz. Debt. 126. Bro. A. & of*
the Case. 40. But if there be two parts of the consideration,
 and one part is valuable and the other not, it is good. But in a
Non Assumpsit both parts must be proved, or the Action will
 fail. *M. 4. Jac. B. R. Lees Case;* but care must be had in gi-
 ving of damages.

If A. delivered to B. the eighth of May, one hundred French
 Crowns, and delivered also as many the ninth of May, and
 B. in consideration thereof, did then and there assume to de-
 liver six shillings in silver for every Crown, upon a *non assump-*
sit, verdict for the plaintiff, and entire damages, the Judge-
 ment was reversed; for the Assumpsit goeth only to that
 which was last delivered. *M. 42. 43. Eliz. Pilsworth and*
Seales Case.

2. The consideration must be lawful; for if the considera-
 tion moving the promise, be either *Malum in se*, or *malum*
prohibitum, it is void. And yet if part of the promise be law-
 ful, and part unlawful, there it may be good. *Dyer. 359.*
Cook 10. 102.

3. If the consideration be executory, there it must be duely
 performed. 9. *H. 7. 13.* otherwise the Action will not lie.
 And therefore if one promise to me, so I will help him to
 gather his Tythe Hay and Corn, he will pay me ten pounds;

If

post 143.

If I help him to gather his Hay only, I cannot recover the ten pounds. *M. 7. Iac. B. R. 8. H. 7. 13.*

All these things are valuable and good considerations, money paid, or any valuable thing done, paid, or delivered, to suffer a Tenant at will to hold the Land longer. *M. 9. Iac. B. R. Coventries Case.* Loan of money. *N. book of Entries. F. 1. 2.* To marry ones child or friend. *N. book of Entries. F. 2.* To ease Land, Sollicite Suits, to deliver one in prison on an execution for debt, out of prison; to forbear a Suit for a certain time, to make, or give up, or release an estate or interest into Land. *Plow. 30. Kelw. 69. 77.* To stand to an Award to be made, not to trouble a man upon a Judgement I have against him; *Hoseboots Case*; to become bound as surety with another. *M. 9. Iac. B. R.* to keep goods safe committed to him. *Old book of Entries. F. 9.* To marry my daughter or kinswoman, or (as it seems) any other at the request of him that makes the promise. To make an obligation; and finally, any thing which for the matter of it may be good in a promise, may be good in a consideration.

In consideration that a stranger shall surrender a Lease to me at the request of the plaintiff, and that the plaintiff shall cancel an Indenture, is a good consideration, if it be done to produce an Action. *Pasch. 9. Iac. B. R. Collins Case.*

If *A.* owe to *B.* fourscore pounds, and *A.* in consideration that I will be bound with him for the money to *B.* promise to enter into a bond of one hundred pounds to me, and I become bound with him, this is a good consideration to give an Action upon his breach of promise. *Adjudg. M. 9. Iac. B. R. Knevatts Case.* So also a promise to do any such thing, may be a good consideration of another promise; for one promise may be a good consideration of another promise, if they be made together at one time; for otherwise they are both void. *Hob. Rep. pl. 16. 116. M. 2. Iac. Co. B. Somers Case, and M. 4. Iac. B. R. Cadels Case.*

If one for forty shillings paid, assume to deliver me forty quarters of Corn at such a time and place for ten pounds to be then paid, this is good; and if I bring the money at the time and place, I may sue for the Corn; if he bring the Corn,
he

he may sue for the money. *Plow. 182. Co. 4. 93.* Goods, or a promise of goods, may be a good consideration for goods, or a promise for goods as well as money. *Fitz. Debt. 68.* But if there be none of this in the Case, it is but *Nudum pactum ex quo non oritur actio.* One doth promise me in consideration that I will not enter a Caveat against the probate of the Will of *I. S.* that he will pay me ten pounds; this is a good consideration whether I have any cause to do so or not. Adjudg. in the Exchequer Chamber.

If *A.* and *B.* be bound in a bond joyntly and severally to pay money, and in truth *A.* is principal, and *A.* saith to *B.* pay the money to the obligee, and I will repay you; this is a good promise; and if *B.* do pay it, he may recover it again by this Action. Adjudg. *9. Car. B. R.*

If I have a Judgement against a man for twenty pounds, and I promise him that if he will pay me the money, I will give him five pounds, this is a good consideration to binde the promise; for it will cost me charge and pains to recover it. *Trin. 38. Eliz. Dixon versus Adams.* So if one take away my goods wrongfully, and I promise him, so he will let me have mine own goods, to give him ten pounds. Adjudg. *Pool & Clifsons Case. temp. Car. R.*

If one say to me, that if I will depose before the Major of *A.* the truth of that which I do affirm, he will pay me twenty pounds, this is good; and if I do voluntarily depose it before the Major, I may recover the money by this Action. *Hill. 38. Eliz. Co. B.*

If *A.* ow to *B.* twenty pounds, and *C.* say to *A.* pay him his twenty pounds, and I will pay it to you again. this is a good consideration to make good the promise. Adjudg. *M. 7. Car. B. R.*

If one have a Judgment against me for one hundred pounds, and he promise me, so I will pay him fifty pounds, he will acknowledge satisfaction, or release the execution of the hundred pound by a day; this is a good consideration to give an Action if it be not done. Adjudg. *Cook & Harvies Case, and M. 38. Eliz. Co. B. Reynolds and Pinhams Case.*

If I be bound in a bond of twenty pounds, to pay ten
S pounds

pounds by a day, and fail at the day, and after the obligee bid me pay twelve pounds to I. S. and he will deliver me up the bond by a day, this is good to give an Action if he do not deliver it. *Harvies Case* 4. *Jac.*

If one that hath my goods, promise me, so that I will let him have them for a moneth, that he will deliver them to me, this is a good consideration to uphold an action against him if he do not deliver them. *Pasch. 37. Eliz. Co. B. May ver. Alvers.*

These also are good considerations, That upon account between them, the Defendant was found so much in debt to the Plaintiff. *Hob. Rep. pl. 117.* So that he was in Debt to him, and in consideration of forbearance promised to pay it. *Coo. 10 77*

part 1 45.

If the Executor or Administrator of one that did owe me money, in consideration thereof, and that he hath assets in his hands, assume to pay me such a day, this is a good consideration to make the promise actionable, especially if I give any time for it. But if there were no debt originally due, or no assets in their hands to pay it, some say no Action will lie. *Coo. 9 93. 94.* But Justice *Hutton* at *Sarum Assizes* 21. *Jac.* held the Action will lie, though there be no assets, and without giving time; & so was it held in *Barns Case*, *Pasch. 9. Jac. B. R. per Cur.*

If an Executor owe me five pounds for the Testator, and buy of me six barrels of Beer, and in consideration hereof, promise to pay me for both; this is a good consideration for both, to charge him *de bonis propriis*, *Trin. 37. Eliz. Cook B. Wheelers Case.*

If *A.* owe *B.* one hundred pounds; and *C.* being a Clothworker to *A.* have cloths of his in his house, and they three agree that *B.* shall have these cloths for his money, and *C.* promise to deliver them, this is a good consideration to binde *C.* to deliver them; for hereby he shall be discharged against *A.* *Adj. Trin. 2. Jac. B. R. Warder versus Chapman.* If I demand ten pounds of another, and he promise me that if I can prove it to be a true Debt, he will pay me; if I prove it as I may in the same suit for it, this will be a good consideration. *Adj. Trin. 18. Jac. Stat. vers. Mary Cook 11. 59. 10. Ed. 4. 11.*

If a Scrivener promise me in consideration that I will let him have the putting out of my money, that he will take good

good security for it ; this is a good consideration, and makes a good Assumpsit, *M. 7. Jac. B. R. Kellinworths Case*. If I deliver one ten pounds to re-deliver to me again, and he do not so, it seems I cannot have this Action for my relief, but I may have an Action of account : but if there be a promise to redeliver it, perhaps this Action will lie. *Hill. 37. Eliz. Coo. B. Howdels Case*.

If one in consideration of a Lease for years made by me, promise to pay me a summe of money, for this money I may have this Action. But if for this he promise to pay me a yearly rent during the Lease, it seems I cannot have an Action of the Case, but my proper remedy is an Action of debt. *Lit. Brook Sess. 452. Fitz. Debt. 129. Morgans Case. M. 18. Jac. B. R.* And yet if I promise another the herbage of my ground for a year, and he promise me xx. s. for it, either of us may have this action against the other. *Adjudg. M. 17. Jac. B. R. Sir George Marshalls Case*.

If one promise me, in consideration he is indebted to me, so much Rent reserved on a Lease for Land, that he will pay me by a day, this is not a good consideration ; otherwise it is if it be for herbage, or for the forbearance of a Rent reserved on a Lease of Land. *14. Jac. B. R. Sir George Marshalls Case. Adjudg. Hill 9. Car. B. R. Bret & Heaths Case*. If one in consideration of Land sold to him by me, promise me twenty pounds at a day certain ; or I sell my Land for twenty pounds to be paid me on a day certain ; in these cases I may have this Action for the money, though the Land be not assured ; for he may compel me in Chancery to assure it. *3. H. 7. 14. 2. H. 7. 12.*

If I promise in consideration of a surrender to be made to me of such Land to pay ten pounds, and a surrender is made, but it is not a good surrender in Law, this is no good consideration to raise the Action. *Hill. 37. Eliz. B. R. Sleight vers. Bateman*.

If I buy Land, Trees, or Corn of a man for money, & he promise to make my assurance, or deliver the Trees or Corn by a day, and do not, or sell it to another, I may have this Action. *21. H. 7. 41. Dyer. 22. Coo. 10. 130. Old B. of Entries. 6.*

If I be seised of Coppyhold Land in fee, and am in debt to A. s. one hundred pounds, and lying very sick I make W. L.

my executor, and declaring my mind to be to surrender it to the use of my executor, to enable him the better to pay the debt, and *L.S.* (heir to the Coppyhold) persuades me not to surrender, but to let the Land descend to him, and he assume to pay the hundred pounds to *I.S.* this is a good consideration to give this Action to the executor. *H.9. Jac. Graces Case.*

If I promise to one, in consideration he will be bound for my friend, I will save him harmless; this is a good consideration to give an Action. *M.9. Jac. B.R. Somersbals Case.*

If I promise to one, in consideration he will lay down his own money, to pay for cloth bought by *I.S.* for me, that I will pay it him again; this is good. *T.9. Jac. B.R. Moors Case.*

If one, in consideration of a pint of wine, promise to assure me Land by a day, and do not. this is a good consideration to give this Action upon the Assumpsit. Adjudg. *Friends Case. T.7. Jac. B.R.*

If I request one to sollicite a business for me, and after he hath done, promise him ten pounds for it, this is a good promise and not naked, for the request and the merits are joyned together; but if it be a meer voluntary courtesie, it is otherwise. *Hob. Rep. pl. 128. 72. Dyer 355.* and it hath been said to be adjudged to lie in this Case, when I do request *B.* to bail my servant, and after I say to him, In consideration that you have at my request bailed my servant, I will pay you ten pound such a day, that this is good.

If one be about to buy goods, or borrow money of me, and another before the sale or loan tell me, that if the buyer or borrower pay not, he will; or if he bid me deliver the things, and if the buyer pay me not, he will pay me on request; these are good considerations. But otherwise it is when the promise comes after the borrowing or buying. *12. H.8. 12. 44. E. 3. 21.* But here must be a demand before the suite begin.

But if I promise to another twenty pounds, because he is my kinsman or acquaintance, this is not good, it is but *Nudum pactum* only. *Plow. 309. 302.*

If one the eighth of *May* deliver me ten pounds, and I do the ninth of *May* promise him in consideration hereof to repay the ten pound, this is no good consideration. But if it were

Demande.

Nudum pactum.

were at the same time, it were good. *M. 42. 43. El. Pilsworths Cafe.* So if I sell on all my Lands or goods, and nothing appointed by the agreement what I shall have for it, it is good, and I shall have the worth of it.

If one buy a horse or some other thing of me for money, and no money is paid, nor earnest given, nor day set for payment, nor the thing delivered; in these Cases no Action will lie for the money or the thing sold, but I may sell it to another; it is *Nudum pactum*. *Plow. 309. 302.* So if I promise to pay one money, to give him a horse, build a house, or the like; and nothing, and no recompence appointed to me for doing it, these are void promises upon which no Action will lie.

If I promise in consideration of something past, as because he hath builded a house, quitted me a trespass, or hath let my friend have wares, that I will pay him money or do any thing else, this is *Nudum pactum*. *Plow. 5. 302.* So if I say to another to whom *I. S.* doth owe money, If he do not pay you, I will pay you, this is *Nudum pactum*. *Do. & St. 105. 12. H. 8. 12. Dyer. 21. 27.* This hath been often adjudged. So if one promise me, if I will deliver him one hundred Crowns, he will deliver them to me again. But if he do deliver me twenty Crowns, and in consideration thereof I did at the time promise to re-deliver them, this is a good promise. *Adjudg.*

If I without other cause promise to give one twenty pounds towards his losses by fire, or to build his house anew; these Assumpsits are not good to give an Action. *17. Ed. 4. 4. Plow. 308.* So if *I. S.* owe me money, and another say, that he will be my pay-master, and pray me to take him debtor for it; this is not good. *Fitz. Debt. 126.* If one promise me twenty pounds because I have built him an house, or if one owe me twenty pounds, and another come to me, and pray me to take him debtor for it; or if he say, if the other do not pay it at *Michaelmas*, he will, these are not good considerations to raise Actions. *9. Ed. 5. 14. 44. Ed. 3. 21.*

If I promise to one so [or if] he will marry my daughter, [kinswoman, or servant] that I will give him [or pay him] twenty pounds, or if I promise twenty pounds with my daughter in marriage; in all these Cases the party may have

this Action for this money. *Plow. 205. Fit. prohib. 3. Do. & St. 104.* So also it is said that if one promise me one hundred pounds in consideration that I have married his kinswoman, that this is good to give an Action, because the consideration doth continue. *M. 8. Car. B. R. per curiam*, and in *M. 4. Car. B. R.* it is said to be so adjudged. But against this it is said to be adjudged in the Exchequer Chamber *inter Sandil & Jenney*, that if I intreat one to marry my daughter, and after the marriage, say that in consideration he hath at my request married my daughter, that I will pay him ten pounds such a day, this Action will not lie; yet the former Judgement seems most to agree with the Cases before and with reason. So if I promise to a woman, that if he she will marry with my son, I will give her to her marriage the one half of all my goods; this is good and Actionable.

If a Bail pay the debt, and hereupon the plaintiff promise to deliver to him the principal obligation, and a Letter of Attorney to sue the principal; this is no good consideration to raise an Action. Adjudg. in the Exchequer Chamber. 38. and 39. *Eliz. Dixon vers. Adams.*

If I promise to a woman having a husband who have a daughter and heir to Land, that if she will give her consent I shall have her daughter, I will pay her ten pounds; This is a good consideration. Adjudg. *Hob. Rep. pl. 20.*

If I promise twenty pounds to a man in consideration he will not beat me; this is no good consideration to make the Assumpsit actionable. 21. *Iac.* One did declare that in consideration that he had sold a horse to him, that he would pay him five pounds, it is said to be adjudged in the Exchequer Chamber good, albeit it had implied time past. *Pas. 8. Iac. Co. B. Mary & Andrews Case.*

If the Obligor pay the money to the Obligee after the day, and thereupon the Obligee promise to deliver the bond and do not, no Action will lie; for the consideration is not good, nor hath the Obligor any remedy but in a Court of equity.

If *A.* owe to me ten bushels of Corn, and deliver them to *B.* Forbearance. to deliver to me, and *B.* pray me to forbear it till *Michaelmas*, and he will pay me the Corn or the worth of it; this

is a good conſideration. and Aſſumpſit, *M. 18. Jac. B. R. Iackſons Caſe.*

If I be in Debt to *I. S.* and I deliver goods to *B.* to pay the Debt to *I. S.* and *I. S.* require the Debt of *B.* who doth deſire him to forbear it three weeks and he will pay him; this is a good Aſſumpſit to give an Action. *Williams Caſe M. 7. Jac. B. R.* But he ſhall recover damage only for forbearance; for the Debt is recoverable ſtill as it was before, *M. 4. Jac. Lees Caſe B. R.*

If I have a Writ againſt *I. S.* and *I. S.* knowing of it doth pray me to forbear to go any further on that Writ, and he will pay me twenty pounds; this is a good conſideration. *Hob. Rep. pl. 278.* and he need not ſhew any cauſe of the firſt Action. But if the conſideration be to forbear, and ſay not how long; this is no good conſideration. *Yardleys Caſe, Hob. Rep. pl. 287.* But if one ow me money and he himſelf or another on his behalf promiſe me that ſo I will forbear him or [not ſue him] till ſuch a day, or not go forwards in my ſuit begun againſt him till ſuch a day, that he will pay me; this is a good conſideration to give an Action. *Coo. 9. 90. 94. New B. of entries, F. 8. 10. 47. Sir Moyl Finches Caſe. M. 4. Jac. B. R.* But if *re vera* no debt were originally due, ſome doubt whether the Action will lie or not: And ſo if the promiſe were by an executor that hath no Aſſets in his hands. *Coo. 9. 90. 94.*

If one ow money to me, and he promiſe me that in conſideration, that I will agree to give further day for the money he owes me, for ſix moneths, he will ſecure it to me; this is no good conſideration; for he may agree to give day and ſue after. *M. 7. Jac. B. R.*

If one be bound by obligation to me to pay *I. S.* money on ſuch a day, and the Obligor promiſe *I. S.* that if he will forbear him till ſuch a day, he will then pay it; this is no good conſideration; for *I. S.* had not cauſe of ſuit, *per Juſtice Bridgman.* So if an infant buy wares or other unneceſſary apparel, and when he comes to full age, in conſideration that he had a good bargain, he doth promiſe, if the other will forbear him a moneth, he will pay him; this is no good conſideration. *Adjudg. 30. Eliz. Withipoles Caſe.*

IF

If one promise to build me an house, make me an estate or any other thing, and there is nothing given or promised by me for it: this is no good Assumpsit, but a *Nudum pactum*. And where one doth promise to do a work by a day, and it is not agreed what he shall have for his pains, or when; or if it be agreed, no part of the money is paid, he cannot sue for the not doing of the work; nor the workman for his money till he have done the work. But if there be a mutual promise of work, and of recompence for the work, they may have mutual Actions on both sides. 3. H. 6. 36. Dyer 21. Plow. 5.

If I promise money to a physician to Cure another poor man, or to a labourer to mend a high way; these are good considerations in Assumpsits on which this Action will lie in respect of the nature of the works. Do. & St. 105. Plow. 35. 17. Ed. 4. 5. Hob. Rep. pl. 278. and if the day of payment be come, they may sue for it before the work be done.

Unlawful.

If a prisoner promise the Sheriff in consideration he will let him escape, he will save him harmless or pay him ten pounds, the consideration is naught, and the promise void. So if one promise me ten pounds if I will maintain him in such a suit, this is naught, Co. 10. 76. 102. Dyer 356. But if one be in Debt to me, and deliver me goods in pledge for the Debt, & a stranger promise to pay me the Debt if I will deliver the pledge; this is a lawful and good consideration. *Levett's Case Adjdg.*

Not pursued.

If one promise to me in consideration I will seal a release to I. S. he will pay me ten pounds, and after at his request I seal it to I. D. in this case I cannot bring this Action for the money, because I have not pursued the consideration. *Trin. 4. Jac. B. R. Cranfield vers. Green.*

Sec. 6.
As to the promise it self.

TO make the promise or Assumpsit it self good, it must have all these qualities.

1. The thing promised must be such a thing as is lawful; for if the thing promised be that which is either evil in it self, as to kill a man, or a prohibited evil, as to forestal Corn, or the like, it is no good Assumpsit, let the consideration be never so good. Dyer 356. Cook 10. 102.

2. The thing promised must be possible to be done; for if one

one promise to do a thing impossible, as to go to Rome within three days, or the like, this is not good.

3. There must be certainty in it; for if a promise be of a thing altogether uncertain, it is altogether void.

4. It must be serious and weighty; for if it be frivolous and idle, it is void.

A promise to do any lawful thing, as to deliver or to give Corn or other goods. *Plow. 182. Fitz. det. 68.* To eat Land, make a house, make or release an estate in Land. *Plow. 1308. Kelw. 69. 77. Finch. 49.* To save a man harmless from a bond entred into, or the like engagement. *M. 9. Jac. B. R.* To stand to an award. *Cook 5. 78.* To keep goods safe. *Old B. of Entries, F. 4.* That Goods shall come safe to Dale. *Cook 6. 47.* From the Lessor to the Lessee at will of a house, not to out him, but to suffer him to enjoy it till such a time. From a creditor that hath a Judgement for his money, that upon payment thereof he will acknowledge satisfaction, or deliver up the bond. *Trin. 38. Eliz. B. R.* To marry a daughter or kinswoman. To pay an Annuity of ten pounds a year for life. *Pasch. 9. Jac. B. R. Collins Case.* Not to molest one upon a Judgement. *M. 9. Jac. B. R.* To save the Lessor harmless and without loss by reason of his inhabitation in his house. *M. 9. Jac. B. R.* That an Attorney shall retain a Rent he is to pay to his Client for Fees due from his Client to him. *M. 9. Jac. B. R. Iarvis Case.* To deliver up a bond, to stand to the award of A. S. or pay twenty pounds. *New Book of Entries, F. 3.* And finally, whatsoever (for the matter of it) is good in the consideration, will be good in the promise.

If one having made me a Lease for years, and saying that I shall quietly hold it without the let of any person whatsoever, this is a good promise; and disturbance with or without Title, is a breach of it, to give Action.

If one in consideration that I will be bound for his appearance, he being Arrested on a Recognizance, promise me to appear at the day, and do not, I may have the Action against him, and do not say that he is a Gentleman, and that he will not excuse him, that a Gentleman came to remove the Record, for I must appear notwithstanding.

If one sell me Land for money, and promise to make me an Assurance of it, or put me in possession of it upon request by a day, and do not; I may have this Action. *Old Book of Entries, F. 5. and recover damages.* And if I will I may waive this, and compell him to make me an Assurance of the Land in Chancery, per three Justices. *Pasch. 9. Jac. B. R. Jolleys Case.*

If one sell me a horse for ten pounds on condition that I pay him this ten pound in Corn; in this case I must pay him in Corn, or he may for his remedy have this Action. *Fitz. Det. 68.*

If one be arrested at my suit for a debt, and make an obligation for the money to pay it at a day to come, but do not deliver, but in consideration of his enlargement promise to seal it upon request, this is good to produce an Action. *Pasch. 9. Jac. B. R. Bassets Case.*

To save
harmless.

If one in consideration I will be bound for him, promise to save me harmless, this is a good Assumpsit; and if I be any way troubled, I may sue him upon it by this Action. *Somertons Case.* So for any thing else that I do at his request. *Boynton versus Vaughan. Pasch. e. 19. Jac. B. R. Old Book of Entries, F. 11.*

If A. promise K. a woman, that if she marry his kinsman, and out-live him, that A. will pay her twenty pounds; and if she do so, this Action will lie. *Hob. Rep. pl. 179.*

If one promise for good consideration to pay me ten pounds, or give me a ground such a day, this is certain enough, and good; and if one of them be not done at the day, this Action lieth; and before the day, he that is to do it hath the election; but after the day, he to whom it is to be done. *Fitz. Debt. 89. 9. Ed. 4. 39.*

If a Chirurgion for good cause warrant or promise to cure a man, or warrant the cure, or a Farrier a horse, and do not the cure, though he be not negligent, this Action will lie against him: And if he undertake the cure only, and make no warranty, and be negligent, an Action of the Case lieth. *Plow. 305. Doc. & Shin. 105. 17. Ed. 4. 25. 5.*

If a terre-tenant of Land promise to me in consideration
on

on that I do assign to him a Statute I have chargeable upon his Land, by way of discharge, that he will pay me twenty pounds; this is a good consideration to produce this Action. But if the assignment of it were to be to a stranger by the consideration, *Contra. Adj. Pasch. 38. Eliz. Perrow. vers. Gray.*

If my debtor who hath Statutes from other men, deliver them to me towards my satisfaction, and dye, and one that is neither his executor or administrator request me to deliver him the Statutes, and he will pay me the debts; this is consideration good enough. *Hob. Rep. pl. 7.*

If one promise to me in consideration that I will make him a lease [generally] that he will pay me ten pounds, this is no good promise, for the consideration is void; for the lease may be a lease at will, and he may avoid it as soon as he makes it. *Pasch. 39. Eliz. C. B. Burkins Case adjdg.* So if the consideration be to forbear a suit, and say not how long. So if the consideration be to relinquish my suit: for I may relinquish it, and begin it again presently. *Pasch. 39. Eliz. in Lurkins Case.* Certainty.

If a promise be to pay money, and say not when, it is good enough, and must be paid presently. So if a promise be to make a Lease for years, and say not when it shall begin, this is good, and shall begin presently. *Cook 10. 76. 102.*

If one promise to make good a house, this is good, and shall be taken to repair it. *M. 21. Jac. B. R. Keyts Case.*

If one ow me money, and another for good cause promise to make it good to me, this is good. *M. 21. Jac. B. R. Keyts Case.*

If one promise me all that he can recover in such a suit, or upon a composition upon such a bond, this is good. *Trin. 19. Jac. B. R. Morris Case.* And all these are certain enough. So if one promise to content me for my work. *M. 17. Jac. B. R. Griffins Case.* So if one promise to give me a childs part, this is good; or so much as he shall give with any child, this is good; for it may be made good by Averment. *Id certum est quod certum reddi potest;* for if he give one hundred pounds by his will to another child, I may recover one hundred pounds of his executor. *Trin. 17. Jac. B. R. Bolles Case.*

If one ow me twenty pounds by Bill, and I promise to deliver him the Bill, and he promise to bring me two sufficient Sureties, and give bond for the money by a day; this is a good promise on both sides; for a promise is a good consideration of a promise. But if the promise be conditional, *contra. M. 38, 39. Fitz. Gower's Case, Adjudg.* And therefore if the agreement between me and *J. S.* be, that if he deliver twenty broad clothes, or if he make me an assurance of such a piece of Land, I will pay him one hundred pounds; in these Cases I cannot be sued for the money till I have the things. So if I promise to make new pales, if I may have the old pales. *37. H. 6. 42, 27. H. 8. 34. Perk. Sect. 713. Dyer 76. 14. H. 8. 20.*

If a Lessee, for years assign his Lease, on condition that the purchaser shall get the good will of the Lessor, and pay the Lessee so much as *J. S.* shall arbitrate; in this Case when he hath gotten his favour, and *J. S.* hath arbitrated, he may have this Action for the money. *14. H. 8. 20.*

If one in consideration that he doth ow me five pounds rent on a Lease of a ground for a year, or a bond, promise to pay it to me upon request, it seems this is not a good consideration. *Hob. Rep. pl. 365.* for it is real and certain, and I have debt for my Rent and bond, and may not have two remedies. And yet if one in consideration he doth ow me five pounds on a Contract, promise to pay me such a day; this is good, *Adjudg.* So if one indebted to me on a bond, or for a Rent, promise in consideration of forbearance of the Debt to pay it; in this case the promise may be good.

Against Law. If one promise to pay, or do a thing which is unlawful, the Assumpsit is void. And therefore if one promise to do that which to do is maintenance, it is void. But if a Solicitor sue upon a promise for money for soliciting a Suit; this is good, for it is lawful, and may be without maintenance. *Hob. Rep. pl. 72. Dyer 356.* But to promise to do any thing of that nature which is not maintenance, or a lawful maintenance, is good.

If a Sheriff for ten pounds promise the Prisoner that he shall escape; this promise is not good, nor will it give an Action. *Cook 10. 76. 102. Dyer 356.*

If *H.* be sued on a Bond, and I become bayl for him, and judgement and execution is had against me; and the Plaintiff doth promise me, so as I will pay him, he will assign me the Bond and the Debt, and make me a Letter of Attourney to sue for it in my own name: this is not a good promise, for it is against Law, being Champerty. Adjudg. *Dixons Case. Trin. 38. Eliz. B. R.*

If one promise an Officer more to do his duty then his just fees, which to take is extortion, this promise is void. *Hib. 22. Jac.*

If I owe a man one hundred pounds, and promise to him, in consideration he will forbear me six Months, I will give him one hundred pounds; this is naught, though part of it be lawful; for the excess is usury. *Trin. 20. Jac. B. R.*

If I arrest a man, to the end he should engage himself to me for money where none is due, and he do so being in Prison, so that it be made by Duress of Imprisonment; this is not good. But an engagement for a due Debt by a Prisoner for his liberty, is not against Law. *Pasch. 9. Jac. B. R.*

If I promise one, so he marry my Daughter, to give him as much as I shall give with any other Child; this is good. And if by my last Will I give one hundred pounds to another Child; he may sue my Executor for an hundred pound. *Gloucester Assizes. 6. Car. Whitlocks Justice.*

A promise to do an impossible thing, as to go to *Rome* in three days, or the like, it seems is void, and not obligatory. *Impossible.*

If one give me twelve pence, and I promise to him in consideration thereof, that if I do not cause him to be whipt to morrow about the Cross in *Gloucester*, I will give him five pounds, and he is not whipt, yet no Action will lie for this five pounds upon this frivolous promise. *Frivolous.*

If one promise to pay me ten pound in consideration of something to be done by me *in futuro*; if I sue for the ten pound, I must set forth and averr that I have done this thing; and till it be done, no Action can be brought for the promise. As if I promise to another, in consideration he

Sec. 7.
How the
pleading in
this Action
must be.

will

What Averment or allegation is necessary in the Declaration, or not.

will forbear his Debt till such a day. I will pay him; I must averr that I did forbear him till the day; for if in this case he sue for his Debt within the time, the Assumpſit and Action upon the promise is gone. *Hob. Rep. pl. 128.* otherwise it is where one promise is the consideration of another; there nothing but the promise is to be shewed to maintain the Action. *Curia M. 4. Jac. B. R. Hil. 38. Eliz. B. R. Thorntons Case. Hob. Rep. pl. 7. 27. 8. H. 8. 34.*

If one for good cause promise to do a thing to me in consideration of another thing to be done by me at such a time, or in such a place, if he sue upon the promise, he must averr he did the thing in the consideration at that time and place.

If all or part of the consideration of a promise be to stand to the Arbitrement of I. S. or to make a Surrender, in a suing for this promise, he must set forth that he hath performed the award, or made a Surrender; for it is not sufficient to say, *Quod fuit paratus stare, &c.* or *Quod fuit paratus cursum reddere.* *M. 9. Jac. B. R. Heseboots Case.*

If one sue upon a promise for a Childs part, as much as he shall give with any Child, in the Declaration he must shew how much he did give with a Child in certain, or it is not good. *Trin. 17. Jac. B. R.*

If one sue upon a promise to satisfy one [or to content one] for a work done, he must say in the Declaration how much he deserved for the work, or it is not good. *M. 17. Jac. B. R.*

If I sell a thing without a price, I must in suing for it, averr it to be worth so much.

If one promise to deliver me twenty of his sheep before his flock is shorn, if I sue for this, I must averr that the flock is shorn; for he hath time to do it till that time. *M. 9. Jac. B. R. Cadels Case.*

Demand.

A Tenant at will of a house in consideration that the Lessor would suffer him to continue in the house till such a time, doth assume to keep the Lessor free and indemnified from all loss and detriment by reason of his inhabitation in the house; and that for every farthing-worth of hurt he will satisfy him two pence; and his servant by his negligence suffers the house to be burnt, this

Action

Action will lie, albeit the Master dwell not there : but in his count he must averr how many farthings it came to, and demand two pence for every farthing in a gross summ. *M. 9. Jac. B. R. Coventries Case.*

If an Executor be sued upon the Assumpsit of the Testator, the Plaintiff needs not to averr that he hath Assets; but it must come on the other side to be averred if it be not so. *Co. 9. 90.*

The plaintiff declared that the defendant in consideration that the plaintiff would be bound for his son, assumed to save him harmless from all such obligations as he at the request of his son should enter into for him, and shewed that he was bound for him such a day &c. to &c. which obligation he was forced to satisfie; and this was adjudged to be a good pleading, though he did not lay any request or notice; for he was not bound to give notice to the father. *M. 9. Jac. B. R. inter Somersball & Barnaby.* Notice.

The Plaintiff declared that *I. S. emisset equum* at such a price, and the Defendant *ad tunc & ibidem ratione premissarum*, did assume to pay the money; this was adjudged to be naught; for the sale did precede the consideration. *Pasch. 9. Jac. B. R. Farmers Case.*

The Plaintiff declared *quod cum* the Defendant was in Debt to the Plaintiff in twenty pounds for meat, drink and lodging for himself and two others, that he did such a day assume to pay it to him; this is no good consideration. *Curia. Steedmans Case.* A. Executor of B. declared against C. upon a promise made to B. that C. would repay to A. all such sums of money as he should lay out of his own money for cloth bought and delivered to the use of C. this is a good consideration to raise an Action, without averring that the cloth did come to his use. *Trin. 9. Jac. B. R. Maars Case.* A. sued B. and declared that B. was indebted to him ten pounds for wheat, Agistments and wares had of the Plaintiff, and in consideration thereof did assume to pay the same to the Plaintiff; it was adjudged good and certain enough. But this were not good in an Action of Debt upon the very

very contract; for that must be more certain. *Hob. Rep. pl. 8.* But to declare thus, that whereas the defendant was indebted to the plaintiff ten pounds, he promised to pay it to him, is not sufficient; for it may be for Rents or Leases or Debts on especialty for which no Action will lie upon a new promise. *Idem.* And yet upon the consideration of forbearance of a Debt due for Rent, or on a Bond, this Action will arise well enough. *Adjudge.*

If the Plaintiff saith that he had a Writ out in such a Term against the Defendant for fifty pound; and the Defendant knowing of it, prayed him to go no further on that Writ, and he would pay him the fifty pound on request: this is sufficient without shewing the cause of the debt. *Hob. Rep. pl. 278.*

A. declared against B. that he accounted with the Defendant for divers summs of money due to the Plaintiff from the Defendant; and upon the Account the Defendant was found in arrear ten pound, and in consideration thereof did promise to pay the money at a day; this was adjudged good, notwithstanding he did not shew for what the money was due, whether for wares, money lent, &c. *Hob. Rep. pl. 16.*

A. declared against B. that in consideration that he had given him time for three months for a Debt of ten pound that he owed him, that he would pay the ten pound after verdict; it was adjudged good enough, albeit he did not shew for what the Debt was. *Hob. Rep. pl. 131.*

See *Moyls Finch's Case* 9 *M. 4. Jac. B. R. Trin. 9.* *See B. R. Deans' Case.* But where it is grounded on an *indebitatus assumpsit*, in which case the Debt it self is the consideration of the promise, there the case must be averred; for a general count in an Action upon the Case, *Quod bene indebitatus fuit*, in such a sum, *super se assumpsit*, without shewing the cause of the Debt, is insufficient; but where there is another consideration, *Contra* As here the forbearance; often Adjudged. *Hob. Rep. pl. 33. Cooke 10. 77.* *See Fuller & Thornes Case* 1 *Pasch. 11. Jac. B. R. accord.* It is one declaration against an Executor, that he was the Testator's

Ho. 10.

in Debt to the Plaintiff 10. l. the executor in consideration thereof assume to pay it without shewing the cause; this is not good. *M. Jac. B. R. Ingrams Case*. Yet see the new book of Entries, F. 2. And yet if in these cases the Defendant shall in pleading aver there was no cause at first, quere.

If *A.* in consideration that *B.* is indebted to *C.* 10. l. assume in consideration that if *C.* will forbear it till *Michaelmas*, that if *B.* pay it not, he will; this is good without averment of the first cause. *Hil. 14. Jac. B. R. A.* declares against *B.* that he bought of *B.* a horse for twenty shillings paid in hand, and for eleven pound more to be paid at the death or marriage of *A.* for which he should become bound with sufficient surety by their writing obligatory. *B.* in consideration hereof promised to deliver the horse on request; avers that he offered to become bound to him, but doth not set forth in what sum, nor with what surety, nor that he did offer to deliver it being sealed; and for these causes after verdict the Judgement was stayed. *Hob. Rep. pl. 79. 96.*

If I promise for good cause to pay ten pounds to *I. S.* Request or when he shall purchase *White Acre*, he must give me notice Demand. ere he can sue. But if it be when a stranger shall purchase Notice. *White Acre*, it seems otherwise; for this is as much in the knowledge of the promisor as the promisee.

If one promise for good cause to save me harmless from such an Engagement, and I be sued, I am not bound before I sue him, to give him notice of it, nor to alledge it in the Court: *Adj. judg. M. 9. Jac. B. Semersbals Case*. But if he have promised to deliver goods to me upon request, I must make an Actual request ere I can sue for the goods. 13. *Car. B. R.* But if I deliver goods to re-deliver upon request, here it seems no request is needful. But when the thing promised to be done doth lie as much in the knowledge of the promisor as of the promisee, as the death or marriage of a stranger, there generally no notice need to be given. *Cook 7. 29.*

If I promise for good cause to pay a man ten pound, and say not when I shall pay it, no demand in this case is needful

needful to be made. If a promise be laid in consideration of a marriage to be had with *J. S.* that the Defendant, if the womans portion shall not amount to four hundred pound, will make it up so much upon request, the Plaintiff must aver a request in his Declaration; but it seems he need not prove it upon a non Assumpsit pleaded; *Glocester Assises. 17. Car. per Baron Henden.*

If a suit be going on to Tryal, and the Defendant in consideration that the Plaintiff shall not go to Tryal, and give him a note of the charge, promise to pay him at his first coming to *Glocester*; in this case if he sue, he must aver not only the forbearance of proceeding and the giving of the note of charges, but the giving of notice of his first coming to *Glocester. Hob. Rep. pl. 63.*

If I have ten quarters of Corn, and I sell one quarter to *J. S.* to pay me half a year hence after the rate as I sell the rest, I must give him notice how I sell the rest, or I cannot sue; and this giving of notice must be averred in my Action. *Hob. Rep. pl. 56.* otherwise it is of an Award.

If I promise on a good consideration to pay ten pounds on demand, it seems here no demand is needful. But if the promise be to do a Collateral thing, as if I promise to pay ten pounds lent to another, if he do not pay it himself at *Michaelsmas* upon demand, in this case he must demand it ere he can sue for it; therefore in his declaration he must set it forth so. *12. H. 8. 12. 17. Jac. B. R.*

If I promise money to the marriage of my daughter or kinswomam, in this case it seems no notice is needful, unless the promise be penal, as if you marry her and I do not pay you twenty pounds in three weeks, I will pay you forty pounds; here the forty pound must be demanded. So also, if I promise a woman that if she will marry with my son, I will give her one half of my lands and goods; in this case it seems there must be notice given before a suit be begun. *Old Book of entries. F. 4. New Book of entries. F. 2.* So also, if I promise a man twenty pounds when he marieth any woman whatsoever, in this case also he must give me notice ere he can sue for the money.

If

If one be arrested for my Debt, and he make an obligation to me for his delivery to pay the money at a day to come, but doth not deliver it as his deed, and doth promise to deliver it upon request, in this case I must make a request. And therefore if I make no request till the day of payment be past, I am remediless at Law, and must fly to the Court of Equity. *Pl. 9. Jac. B. R. Bassets Case* by two Judges.

THE Plaintiff declared that in consideration he would dye divers Clothes which he counted to sixty, that the Defendant did promise to pay him for every Cloth ten shillings, and averred he did dye them all, being fifty nine Clothes, and that the money came to so much; So that fifty nine was put for sixty, but after verdict adjudged good. *Hob. Rep. pl. 120.*

Sec. 8.
What errors
in pleading
are fatal, or
not.

The Plaintiff declared that he had sold to the Defendant so many Oates, as according to the rate of fifteen shillings nine pence for every quarter, shall amount to fifty two pound, to be delivered at such a time, and that the said Oates after such a rate came to ninety six quarters and six bushels, which the Defendant had not delivered, &c. which money the Plaintiff was to pay at a day certain; after verdict it was adjudged good, notwithstanding the mistake; for the ninety six quarters of Oates after the rate came to fifty two pounds three quarters. *Hob. Rep. pl. 114.* But generally in all special Actions of the case upon a promise, if any substantial variance be between the laying of the Action and the evidence, it will be fatal; wherefore it is policy in the Plaintiff in all these cases to suppose several promises as near the matter as he can frame, that he may be sure in one of them to hit the very promise it self, or at least the substance thereof.

No Traverse can be of consideration executed alone; but a consideration executory may be traversed alone. *Hob. Rep. pl. 128.*

Traverse.

If

Sec. 9.
How an Assumpsit shall be taken; and what shall be said to be a breach of it, or not.

IF the Lessor assume to his Lessee on good consideration, that he shall hold the land without the let of any person whatsoever; this shall be taken a let by one that hath no title, as well as by one that hath a title; and either of them will be a breach, and give an Action. *Dyer* 328. *Gambles Case. M. 7. fac. B. R.*

If my tenant at will of my house promise upon good cause to save me harmless and indemnified from all loss and harm by reason of his inhabitation in the said house, and by the neglect of his servant the house is burnt; this is a breach to give an Action. *Coventries Case.*

If I promise to *L. S.* that his goods shall come safe to *Dale*, and they be arrested by the way; this is a breach of the promise, and Actionable. *Cook* 6. 47.

If one for good cause promise to make a Feoffment of Land by a day, and before the day he enfeoff another, or grant a rent charge out of it; this is a breach of the promise. So if he promise me trees out of a wood, and before the time he sell them away. So if he promise me the delivery of a horse, and before the day he sell him to another. *Dyer* 22. 21. *H. 7. 41. Cook* 19. 130. *Kelw.* 77. 20. *H. 6. 34. F.N. B. 99. k.* And albeit he make the Feoffment, yet this is no good performance. *Old B. of Entries* f. 7. 3. *H. 7. 14. Fitz.* 8. B.

If one promise to deliver wares, and he deliver false and sophisticated wares; this is a breach of the promise. So if he promise me to make a Surrender of an estate, and he make a Surrender that is not good; this is no performance, but a breach. *Dyer* 75. 23, 24. *Hill.* 37. *Eliz. B. R. Sleights Case.*

Election.

If a promise be to do one of two things by a day, till the day be past he that made the promise hath the election. But after the day, he to whom it is made hath the election. 9 *Ed.* 4. 39. *Cook* 9. 94. 6.

Sheweth

If it be part of the agreement to give a bond with sureties, and say not what sureties, nor in what sum; the Court must judge what sureties, and what sum. *Hob. Rep.* pl. 79.

If for good cause the promise be to pay money, and no time set, it shall be presently; and if it be to make a Lease

Lease for years, and no time set when it shall begin, it shall begin presently. *Cook* 10. 77. *Cook* 6. 33. But if one promise to deliver me goods, or make a Lease, or the like, and no time is set; in this case he shall have all his life time to do it, except I hasten it by request.

If one promise for ten pounds paid him in hand to build me an house; this is a conditional promise, and the money must be paid ere the promise will have vertue to produce an Action; and is not like as where on promises to build a house, and the other doth promise ten pounds; there they are reciprocal, and they have equal remedy.

If one bind himself by promise to pay money yearly or quarterly at several days; upon the breach of the promise one day, this Action will lie; but an Action of Debt will not lie upon the Contract till all the days are past. 11. H. 6. 18. *Broo.* 108. *Dyer* 113. *Cook* 4. 94.

Where a promise good may become void by matter *Ex post facto*. See Contract.

CHAP. XIX.

Of an Action upon the Case for a Nuisance.

A Nuisance is where any thing is done by a man upon his own ground, or elsewhere to the unlawful hurt and annoyance of another that is his neighbour, in his free lands or otherwise. And this is either common, when it is or may be a grievance to many; or special, when it is only or especially a hurt to some few; or particular, when it is or may be a hurt only to one particular man. *O. N. B.* 108, 109. *F. N. B.* 193.

A Nuisance may be by stopping or annoying a mans water, way, light or air, by building, diverting, stopping, digging, or the like; for remedy whereof the party grieved may have this Action. And therefore if a man set up a house upon a new foundation so near to my house, that thereby he stop up my windows, and take away my light and prospect, I may have this Action. But if his building be upon an old foundation, and where there was an house before, no Action will lie for this; *Cuius est solum, ejus est usque ad Cælum.*

What it is.

How many kinds there are.

What shall be said a Nuisance or not, for which this Action of the Case may be had, or not.

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What it is.

How many kinds there are.

What shall be said a Nuisance or not, for which this Action of the Case may be had, or not.

N. Book of Entries, f. 19. 20. Co. 9. 55. 5. 10. Hughes Case. So if a man do over-build my house, so that his house eves do drop upon my house, and cause it to perish, or trouble my dwelling, I may have this Action. 22. H. 6. 14. And yet in *Trin. 42. Quinter Nicholson & Bradshaw*, Lessee for years of a shop, brought an Action against one that was Tenant, at will of a Kitchin over the shop, for suffering it to decay, and to spoil the wares of his shop, and after a Judgement for the Plaintiff it was reversed.

The erecting of a Die-house, Pigstie, house of Office, Brew-house, or Chimney, may be a Nuisance to the Neighbourhood, for which he that is hurt may have his Action. *Pasch. 5. Jac. B.R.*

If I have a building beneath, and another man hath a building above me, and I suffer mine to decay so as to hazard his, or he suffereth his to decay so as to harm mine, in this Case each of us may have this Action against the other. *Old Book of Entries, F. 3. Kelw. 48.* If one set up a Pigstie under my house, and keep Pigs in it, or a house of Office, Lime-kiln or Brewhouse, and use it so near my house that the smell thereof doth annoy me, and hazard my health, or the smoke of the Brewhouse or Lime kiln, destroy or hurt my Trees; in these Cases, and for these wrongs, I may have this remedie. *Co. 5. 73. 101. M. 8 Jac. Adjdg. Aldreds Case.* The building of a Brew-house, or the keeping of a Chandlers or a Butchers shop by my neighbour, in a place inconvenient, to the offence of my Garden or House, may be a Nuisance, for which I may have this Action. *Trin. 13. Car. B. R.* But if such a man do set up his Trade by me, though this be offensive to me, yet I cannot have this Action, per *Cook & Warberton Justices. M. 8. Jac. And Pasch. 5. Jac. B. R.* If a man have a house very near mine, and he suffer it to decay, and fall, and throw down some of mine, it seems I may have this Action for this. *Co. upon Lis. F. 56.*

About Ways.

If I have a private way to my house or ground, and a man stop it or mar it, that I cannot have it in all or part, this is such a wrong as for which I may have this Action. *Co. 5. 73. F. N. B. 184.* But if the wrong be to the common high-ways, this

this Action will not lie, but it must be punished in a Leet, or some other Court. And yet if a Nuisance be done to a common high-way, whereby I have more special loss than another, as if he dig a pit, or lay a block there, and my horse stumble, and I fall and have hurt by it, for this I may have this Action. *Coo. super Lit. 56. Coo. 9. 55. Exod. 21. 33. Pasch. 5. Jac. B.R. Penhams Case 27. H. 8. 26.* A man being drunk rode along a high-way, which was 160 foot in breadth, and in some green parcels of the way there were laid pieces of Timber for the use of the houses thereabouts, and the drunken mans horse stumbled at one of these, and fell, and hurt him, and he brought this Action, and the Defendant prescribed to lay his Timber there, and yet it was adjudged against him, as Justice *Bridgman* said at the Marches of *Wales* in my hearing; It lieth against one for stopping of my way *totaliter*, so that I cannot use my Common. *Pasch. 13. Eliz.*

If I have a Water-course or Conduit belonging to my In Waters. house or ground, and another man stop or mar it by liming, tanning, or the like, in part or in all, I may have this Action. *N. Book of Entries 18. Coo. 5. 73. FNB 184. 14. H. 8. pl. ult.* But if the water be a common water, and belong no more to me then to others; in this case I may not have this remedy, but some other; and yet if in this case I have any special prejudice by the thing done, it seems I may have this Action, as well as in the Case before of a Nuisance upon the high-way.

If any one set up any house of Office, Lime-kiln, Tan-house, In Air. or lay any filth so near my dwelling that it corrupteth the Air, and be dangerous and grievous to me, and my family, I may have this Action. *New B. of entries, F. 18, 19.*

If the Commoner be oured or disturbed in the Common, In Common. by drowning or planting Conies upon it, or the like, so that there is not enough left for him, and he cannot take it according as he ought, and hath been used to have it, he may have this Action; But if it be so small a trespass that it doth not hurt his Common, but he hath enough besides, no Action will lie for this. *Coo. 9. 112, 113. 8. 79. 4. 39. Dyer. 316.*

If a man by building, &c. stop up my ancient Lights of my In Lights. house, to my prejudice, I may have this Action for my relief. *N. B. of Entries, f. 19.* If

In setting a
Mill.

If I have a Mill upon a River, and another man setteth up a Mill upon the same River, whereby I lose part of my custom, I cannot have this Action against him for this. And yet if he set up a Mill where I by an ancient custom have the grinding of all the grist, and none ought to have a Mill but my self, or if thereby my water be stoppt or turned, that it doth not come so freely as formerly; in these Cases I may perhaps have this remedy. So if any do break down the sluices, or throw down the banks, that the water doth not come as formerly. *Old. B. of Entries, F. 10.*

In setting up a
Market.

If one levy a new Market without authority, *ad nocumētum* of my ancient Market, I may have this Action. *M. 41, & 42. Eliz. Co. B. Maynes, and the City of Londons Case.*

Wood pile.

If my neighbour set up a Wood-pile against my house, upon his own ground, whereby my light or prospect is hurt, I may have this Action. *Cook 9. 55.*

School.

If a Schoolmaster keep School so near to my study, being a Lawyer, that the scholars disturb my study, I may not have this Action. *Curia M. 8. Jac.*

Pigeon-house.

So if any man set up a Pigeon-house that doth hurt by his Pigeons in the neighbourhood. *Cook 5. Hill. 39. Eliz. Co. B.*

Conies.

So if a man plant his own ground with Conies, and they do trespass to his neighbours, whether it be a free Warren or not; there is no remedy for the party grieved, but to kill the Conies upon his own ground, which he may lawfully do. *Adjndg. Hill. 39. Eliz. Co. B.*

School.

If I have a School, and another Schoolmaster set up a School by me, I cannot have an Action for this. *11. H. 6. 64. 47. 22. H. 6. 14, 15.*

post 196.

If the Nuisance be by stopping a Way, Water-course or Conduit, or hurting of a Common, and it be wholly stoppt, or the Common wholly taken away, and he whose way, &c. it is, be a Free-holder of the thing to which it doth belong; it is said in this Case he is to have some other remedy. But if he have only a Lease for years, or a Copyhold-estate of that to which it doth belong, and it be wholly stoppt or taken away; or he be a Free-holder, and it be stoppt or let in part only; in these Cases the proper remedy is by this Action. *Cook 5. 73. 101. 9. 113. F. N. B. 184.*

CHAP.

CHAP. XX.

Of an Action upon the Case upon a Trover and Conversion.

THIS ACTION is a kind of Action of the Case which a What it is.
man hath against another, that having gotten any of his
goods, doth refuse to deliver them upon demand. *New terms*
of the Law.

It will lie against any man that hath had my goods, and converted them; as if my Horse have been sold by twenty men, I may bring this Action against any of them; and it will lie against any one that hath the possession of the goods, though he have them by borrowing only. *Experientia* 17.

In what case it
doth lie or
not, For the
persons.

Car. per. Baron Henden.

This Action will not lie for wood growing. *M. 20. Jac. B.* For the nature
R. nor for things that are *fera natura*, nor for any part of a of the thing.
free-hold, as for Lead upon the house while it is so; but after it is taken off, if it be converted it will lie for it; nor as is generally held for money at large, as for 10*l.* in money, but it will lie for money in a bag or chest, or for so many peeces of Gold of 20*s* a peece, or so many peeces of Silver in certain; and it will lie for any other goods animate, as Oxen, Horses, Hens, and the like; or inanimate, as Rings, Carpets, Woods or Trees cut down, and the like; so for things that are *fera natura*, as Deer, Hawks, & the like, after they are reclaimed.

If another man get into his hands any such goods, living or dead, being my goods, by finding, or otherwise, in any case whatsoever, where he hath not a right in property or possession to the thing, and he waste it, or convey it away, sell it or otherwise convert it to his own use, or keep it from me, I may have remedy by this Action. And therefore if I lose my goods, and another man find them; as if he take up my Hawk that is escaped, or my Horse or Beast that was strayed away; or if a man who is Executor to another, have my goods that were in the keeping of the Testator, come to him amongst the Testators goods, or a Felon leave my goods within a Mannor, and the Lords Bayliff seize them, not being waved; or if a man ride my Horse to an Inn, and the

For the Case.

Inn-keeper keep my Horse from me; in these and all such like cases I may have this Action for my remedy. 12. *Ed.* 4. 8. 12. *H. 8.* 3. 9. 7. *H. 4.* 3. *Dyer* 306. *Cook* 2. 25. 5. 27. 109. *O. B. of Ent.* f. 4. *Litt. Broo.* f. 174. 198. 382. 405. *Finchesley* 181, 186.

If a man that is a Suitor to a woman, give her in the wooing-time gifts, and they do not go on, but break off, and she refuse to re-deliver these goods, it seems he may have remedy by this Action for the goods. *Womans Lawier*, f. 71. f. 32. *Dame Fitz Case.* *M. 7.* fac. *B. R.*

But this Action will not lie in these cases following, viz.
 1. When he that brings the Action hath neither right to, or property in, nor hath had a possession in the thing sued for; and if he bring the Action upon a possession, he must shew that he was once in the actual possession of it. 2. Where the party that hath the goods hath them by delivery with a Trust; as where I deliver my goods to a Carrier to carry for me, and he doth keep or convey, and dispose them another way. *Wormwals Case.* *M. 9.* fac. but another kind of Action of the Case doth lie in this Case. 3. Nor where the party that hath the goods hath a good property in them, by sale, gift, or otherwise, as being seized for a Harlot, or the like. *N. Book Entries*, 39, 41. *Cook* 8. 15. *Brook* 405. 193. *Brook Distress* 198. 4. Nor where the party that hath the goods hath a lawful possession of them; as where another man doth bring my Horse into an Inn, and there refuseth to pay for his meat, and the Inn keeper detaineth him for his meat, as he lawfully may do till he be paid; or where goods are duly seized as a waif or estray, or the like. *N. Book of Ent.* f. 10. 41, &c. *Cook* 8. 147. *Hill.* 14. fac. *B. R.* *Adjudge Robsons Case.* 5. Nor as it seems for a bare finding or receipt of goods, and a possession only without any Conversion. And therefore if one deliver another mans goods to me, and I do not convert them, it seems this Action will not lie; it seems then that the conversion is traversable. *Dyer* 121. *Finchesley* 186. per *Baron Henden* at *Glouc.* *Affizes*, 17. *Car.*

What must be proved or averred to make good this Action.

To maintain and bear up this Action, these things are necessary to be averred or proved in the Case. 1. The Plaintiffs right to the thing. 2. That the Defendant hath or had it.

3. A

3. A demand of the goods; and denial; for how else shall a man that finds goods know the owner? and to whom to deliver them? by Sergeant *Turner* at *Lent* Assizes at *Glouc.* 23. *Car.* 4. Some say there must be a Conversion; and in *Trin.* 44. *Eliz.* in *Com. B.* it was adjudged, that if *A.* deliver a Chain of gold to *B.* and *A.* demand it, and *B.* deny it, and say he shall not have it till he can recover it, that this was no Conversion. But I take it the contrary is held and practised at this day; and *Baron Henden* at *Glouc.* Assizes, 17. *Car.* ruled it, that a demand and a denial is a conversion; and whatever is such an Act for which Trespass will lie, is a Conversion to give this Action of the Case on a Trover. 5. And these things must be set forth in the Declaration; but the time of the Conversion is not needful to be set forth in the Declaration. *M.* 37. 38. *Eliz.* *Co. B.* *Earl of Rutlands Case.*

CHAP. XXI.

Of an Action of the Case for a Conspiracy or Confederacy.

A Conspiracy strictly taken, is, where two or more persons do purposely and maliciously conspire and labour together falsely and unjustly, and without any ground at all to indict another for some Treason, Felony, or other offence; and after he which is so indicted is upon that indictment after a lawful Trial purged and acquitted. In this case, and for this wrong, as he may have other remedy, so he may have remedy by an Action of the Case, wherein the Plaintiff shall recover damages according to his hurt. *Cook* 9. 56. *F N B* 114, 115, 116.

If two or more falsely and maliciously conspire to indict or appeal another of any offence against any Law; and after he that is so indicted is acquitted, a Writ of Conspiracy lies. *F N B* 114, 115, 116. *Cook* 5. 56. And in all Cases where the practice and procurement is such by one person, that if there were more joyned with him, a Writ of Conspiracy would lie, there a general Action of the Case will lie. *F N B* 116. *L.*

If one man only falsely and maliciously cause another to be indicted for Felony, Barrettry, or the like, who is thereupon acquitted,

What it is.

Where and in what case this Action will lie for a Conspiracy, or not, And how?

acquired, an Action of the Case in the nature of a Writ of Conspiracy lieth: this hath been often adjudged: And in this Case the Plaintiff that brings the Action, must be sure to make it good that it be false and malicious; for the malice is the ground of the Action: For if upon the Trial it doth appear, that either it was forced in a course of Justice, or there was *probabilis causa* for the indictment and prosecution, no Action will lie. *March* f. 130. 41, 42. *Eliz. Co. B. Sheringtons Case*. And in this Case the Plaintiff need not say that he was *Legitimo modo acquietatus*, as he must in a Writ of Conspiracy. *Pos. 3. Jac. B. R. Marshams Case*. And if a man do procure another to be arrested, brought before Justices, examined or imprisoned for a Felony, with a plot to vex and disgrace him, albeit he be not indicted for the Felony, it seems for this only he may have this Action of the Case. *Cook* 9. 56, 57. *Cook* 4. 14, 15. *F. N. B.* 116, 114. And in these Cases, and for these wrongs, it is better to bring this Action of the Case, then to bring a Writ of Conspiracy, which is a special Action in the nature of an Action of the Case. For in all Cases where a Writ of Conspiracy lieth, there must be these things incident to the Case. 1. There must be two or more in the Plot; for this Writ of Conspiracy will not lie against one, nor against a man and his wife (who are but one in Law) unless the Writ be, that they *simul cum* others did it. And hence it is that if this suit be begun against divers, and all but one are discharged of it to all intents, as being acquit by verdict; hereby he is discharged also. *F. N. B.* 114, 116. 18. *Ed. 4. 1. Br. Conspiracy* 21. But if the Writ be brought against two, and the one of them is attainted, and the other doth barr the Plaintiff by a demurr in Law, or one doth appear and plead, and his plea is found against him; in these cases the other is not discharged, but the Plaintiff shall recover, though the other be not attainted. And yet in this Case perhaps he may refuse to answer without the other; or if all the Conspirators but one be dead, there the Writ may be had against him alone. *F. N. B.* 116, 115. 40. *Ed. 3. 19. 38. Ed. 3. 35. H. 6. 14. 24. H. 6. 25.* 2. The party that brings this Action of Conspiracy must be indicted, arraigned and acquitted;

quitted; for it will not lie for a plot or preparation without an execution, *Non officit conatus nisi sequatur effectus. Cook 9. 56. F.N.B. 114.* 3. The proceeding and prosecution must be voluntary. And therefore neither this Action, nor an Action of the Case in general will lie against such men as do prosecute by constraint or compulsion, as when men are obliged to it by Oath or Office, as Justices of Peace, or Jurors sworn to present such offences, or Witnesses called to testify their knowledge of such things, or one doth come into a Court voluntarily, and discover a Felon; for all this is justifiable. *27. Ass. pl. 12. Ed. 4. 18. 21. Ed. 3. 17. 7. H. 4 31. 35. H. 6. 14. 20. H. 6. 5. F.N.B. 115. L. Broo. Conspiracy, 4.* 4. The proceeding must be malicious. And therefore if one man do prosecute another upon good ground, as when a Felony is done, and there is some cause of suspicion of that person more than another, either by the common fame or otherwise, as when a man is robbed, and the next village upon a hue and cry doth make pursuit, and take a man they suspect, and thereupon the party robbed doth indict that man, and he is acquitted; or a Coroner after a murder, sitting *super visum corporis*, cannot find out the murder; and then enquiring of the first finders of the body, they present that *I. S.* killed him; and thereupon *I. S.* is indicted and acquitted: these proceedings are not punishable by any Action. *Broo. Conspiracy 4. Trin. 9. Jac. B. R. Wall vers. Hill.* 5. The charge and accusation must be false; and therefore if the conspiracy be supposed to indict a man for murder, and upon his arraignment it is found he killed the man, but the killing was lawful *per infortunium*, or *se defendendo*: this Writ will not lie: *Fitz. Conspiracy 21. Stamf. lib. 3. chap. 12.* 6. The party indicted or appealed must be *legitimo modo acquietatus* (*viz.*) he must be acquitted upon his trial by the petty Jury after indictment found by the grand Jury, or if he bring an appeal, be non-suit, or the like. And therefore if the acquittal be by a general or particular pardon, or he is discharged by the insufficiency of the indictment; or the party be indicted, and an *Ignoramus* be found upon the Bill; in all these cases this Writ of conspiracy will not lie. *9. Ed. 4. 12. F.N.B. 114.*

Coo. 4. 45. And yet the last case is doubted of some, and the contrary is said to be twice adjudged in 41. *Eliz. B. R.* and 20. *Jac.* See 19. *R. 2. tit. Brief 926.*

What matter shall be said a good Barr or Plea in this Action, or nor.

It is a good Plea in Barr to this Action, that there hath been an accord made between the Parties, and the same is executed. 21. *H. 6. 28.* So it is a good Plea to shew that the Inditement or Acquittal was erroneous, albeit the Party Indicted did not take advantage of it. *Cook 9. 26. 9. Ed. 4. 12.* So it is a good Plea to say, That there is no such Record as the Plaintiff sets forth. 9. *H. 6. 26.* So any of the things before may be pleaded, that that which was done was done by compulsion, and *ex officio*, as by Jurors and Witnesses, or the like. 20. *H. 6. 5.* But it is no good Plea to say for one, that another is dead, hanging the Writ. 18. *Ed. 4. 1.* nor to say that the Plaintiff was guilty of the Felony whereof he is so acquitted; nor to say that the Record is, that the Plaintiff and divers others are indicted besides the Plaintiff. 9. *Ed. 4. 23.*

CHAP. XXII.

Of an Action of the Case for a Disceipt.

What it is.

Disceipt is said to be a Writ, either original, when it is brought against a man for some deceit he hath used or done; or judicial, where upon some Writ directed to the Sheriff, he doth make a false return, and thereby the Defendant doth lose his Land: in both cases he may have an Action of the Case for his relief; and in the last case, the act unduly done will be avoyded also. *N. Terms of the L. 15. 1. F. N. B. 95.*

What shall be said to be a Disceipt for which and where this Action lieth, or not. Against an Attorney.

If a man make his Attorney in a real Action brought against him, and the Attorney by agreement suffer Judgement to be given, and the Land be lost, his Client may have this Action for his remedy. *F. N. B. 95. Cook 6. 9. Old B. Entr. 2.* So if he use any falshood or deceit whatsoever, sue me for another, or another appear or plead for me without warrant, or if my Attorney in a suit for or against me shall do any thing without warrant, and I be hurt thereby, I may have this Action against him. *Cook 7. 1. 2. Dyer 361. 13. F. N. B. 98. k.* So if the Attorney for Plaintiff or Defendant do any way do against

against or besides his office. *Idem.* 20. H. 6. 25. 15. H. 7. 14.
Old Book of Entries, 2.

If I appoint my Attorney to take an obligation for me in my own name, and he take it to himself, and in his own name, I may have this Action against him. 20. H. 6. 4. 25. 3. H. 7. 14. Br. 117. So it it be to buy a Lease, and he buy it for himself. 3. H. 7. 14. 17. 10. H. 6. 25.

If my Attorney or Councellour discover my Conveyances or other secrets which I have shewed to him, to my prejudice, I may have this remedy against him. 11. H. 6. 18. *Broo.* 108. or procure himself to be retained for the other side. *Old B. of Entries*, f. 2. but if another that is not a Lawyer discover my Evidences I have shewed to him, *Contra.* 11. H. 6. 18.

If any mischief come to me in any suit between me and another, by the false return of a Sheriff, I may have my remedy by this Action. *Co. sup. Litt.* 259. *Co.* 6. 9. *F N B* 97, 98. *Co.* 9. 32. *Dyer* 353. But if a Judgement be had by default against me, being all that time in Prison, and I be summoned according to Law, I cannot have this Action. *Co. sup. Litt.* 259.

If in a suit or Action another person will come in Court, and pretend he is the party to the suit, and so let Judgement be had, or some other prejudice be done to the party himself, he may have this remedy against him that doth it. As for example; if one purchase a Writ out of the Chancery in my name, and upon that Writ a fine is to be paid to the King; or if I have cause to bring an Action, and another bring it in my name, and let Judgement go against me by non-suit, or the like; or if one acknowledge a Judgement, levy a fine, suffer a Recovery in my name, & all this is done without my leave or privity; in all these cases this Action lieth for remedy. *F N B* 96, 97, 100. 19. H. 6. 44. *F N B*. So for any other thing a man shall do in my name, and for me in a Court, without my agreement. *Idem.*

If a Writ be brought against two as Executors, and one of them is no Executor, and he that is Executor confesses the Action, the other that is huiet hereby may have remedy by this Action. *F N B* 98. 9. *Ed.* 4. 15.

If one acknowledge a Statute, Recognizance, or enter into a Bayl

Keehin juringd
3 738 *alib*

By Forgery.

Bayl in my name, if I be hereby damnified, I may have reparations by this Writ. 19.H.6.44. *F.N.B.* 100.

If any man forge a Deed in my name, and it be given in Evidence, or made use of against me, and I receive any hurt by it, I may have my remedy by this Action. 5.Ed. 4. 126. 116. *F.N.B.* 99. k. But for a forging only this Action will not lie; The same,

If one that is not the true Executor or Administrator get a Statute made to the Testator, and come into the Chancery and shew the Testament proved, or the letters of Administration, and so getteth out Writs, and hath Execution, the true Executor may have this Writ against this counterfeit one. So if he do in the life time of the Conusee, supposing him to be dead. 2.R. 3. 8.

Delays in
suits.

If a man in a suit will procure a protection for a year, and do not pursue it accordingly, but remove the suit, or do any such act, which by matter *Ex post facto* shall appear to be but to make delay, the party grieved may have this Action for his relief. *F.N.B.* 97. 20. H.6. 10. Cook 5. 34. So if he get a Writ of priviledge as a servant to one of the Clerks in Chancery, when in truth he is not so. 11.H.6.8. So if the Effoyner cast an effoyne, and warrant it not at the day, the Demandant that is hereby delayed may have this remedy. *Broo. Disceit.* 40.

If I enter into a Statute to pay money by a day, and pay it, and after another get the Statute, and sue it against me, I may have this Action against him that doth it. *F.N.B.* 100. So if any man sue me in anothers name without his privy, I may sue him in this Action. *F. Act. on the Case.* 3. *F.N.B.* 100. 96, 97.

If one procure another to sue and vex me without cause, I may have this remedy against the procurer. *F.N.B.* 98. 116.

If one counterfeit a Letter in my name, and deliver it to my servant, and the effect of it is to perswade him to deliver the Counterfeiter money, and my servant doth deliver it; in this case I may for my relief have this Action against the counterfeiter. *Adjmdg. Trin. 7. Jac. B.R. Tracies Case.*

If a Tenant in ancient demeasne leavy a Fine of his Land at common Law, it seems the Lord may have this Action. *Plow.* 370. *F.N.B.* 98, 99.

If one that doth play with me doth use false dice, and co- In Play.
zen me of my money thereby, I may have this Action against
him. *Cook* 11.87. *FN B 95. New Book of Entries*, 8.

If a man sell me any living or dead thing, as Cattel, Cloth, or In a Contract
the like, and at the time of the sale he doth warrant it to me or Bargain.

good and right, and it be otherwise, I may have this Action
for my remedy; and this will lie, albeit I have not paid all the
money for the thing bought. *Kelw.* 89. 9 *H.* 7.22. 5 *H.* 7.41.

FN B 94. Old N. B. 50. And if the seller say he will war-
rant it, but doth not say to me yet this is a good war-

ranty. *Pasch.* 3. *Jac. B. R. Curia. Old Book of Entries*, 9.

Upon a War-
ranty.

If one sell me Clothes, and warrant them to be of a certain
length, and they be not so, I may have remedy by this Acti-
on. *FN B 98. 11 Ed.* 4. 2.

If one sell me a Horse, and warrant him sound wind and
limb, and he hath some secret disease known to the seller,
and not visible to the buyer; as if he be shoulder-shot, or the
like, this Action lieth for this. *Adj. Trin.* 18. *Jac. B. R.* 11 *Ed.*
4. 6. 13 *H.* 4. 1. But it is held by some it will not lie upon a
warranty, when the fault is such as the seller did not know of
it. *FN B 94.* But the books are general, and it seems the
Law is otherwise. So it is said it will not lie upon the war-
ranty, when the fault is apparent that the buyer may discern
it by one of his five senses: As when the seller doth warrant
the Clothes to be Red, and the buyer having seen them, and
they be Blew; or he doth warrant a Horse to be sound, and
he hath a splint, spavie, boyl, or is lame. 13 *H.* 4. 2. 7 *H.* 4. 14.
5 *H.* 7. 41. 20 *H.* 6. 37. 31 *H.* 6. 11. So when the warranty
doth extend to a thing to come, as that a Horse shall carry a
man 30 miles a day. *Finchesley* 188. So when the warranty
is made after the thing is sold, and is no part of the contract;
and yer such a warranty *ex post facto*, if it be by Deed, may
amount to a Covenant. 5 *H.* 7. 41. 11 *Ed.* 4. 6. *FN B 98.*
Pasch. 3. *Jac. B. R. Goldsmiths Case.*

If one sell me corrupt victual or wine, as if he mix wine Without a
and water, or the like, without any warranty, I may have this Warranty.
Action against him for his deceit. *Kelw.* 91. 11 *Ed.* 4. 6. But if
one sell corrupt, or false and sophisticated wares, it seems no
anw: so.

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Bayl in my name, if I be hereby damnified, I may have reparations by this Writ. 19.H.6.44. *F.N.B.* 100.

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If a man in a suit will procure a protection for a year, and do not pursue it accordingly, but remove the suit, or do any such act, which by matter *Ex post facto* shall appear to be but to make delay, the party grieved may have this Action for his relief. *F.N.B.* 97. 20. H.6.10. *Cook* 5.34. So if he get a Writ of priviledge as a servant to one of the Clerks in Chancery, when in truth he is not so. 11.H.6.8. So if the Essoyners cast an essoyn, and warrant it not at the day, the Demandant that is hereby delayed may have this remedy. *Broo. Disceit.* 40.

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If one procure another to sue and vex me without cause, I may have this remedy against the procurer. *F.N.B.* 98. 116.

If one counterfeit a Letter in my name, and deliver it to my servant, and the effect of it is to perswade him to deliver the Counterfeiter money, and my servant doth deliver it; in this case I may for my relief have this Action against the counterfeiter. *Adjndg. Trin.* 7. Jac. B.R. *Tracies Case.*

If a Tenant in ancient demesne leavy a Fine of his Land at common Law, it seems the Lord may have this Action. *Plow.* 370. *F.N.B.* 98, 99.

If one that doth play with me doth use false dice, and co-zen me of my money thereby, I may have this Action against him. *Cook* 11.87. *F N B* 95. *New Book of Entries*, 8.

If a man sell me any living or dead thing, as Cattel, Cloth, or the like, and at the time of the sale he doth warrant it to me good and right, and it be otherwise, I may have this Action for my remedy; and this will lie, albeit I have not paid all the money for the thing bought. *Kelw.* 89. 9 *H.* 7.22. 5 *H.* 7.41. *F N B* 94. *Old N. B.* 50. And if the seller say he will warrant it, but doth not say to me yet this is a good warranty. *Pasch.* 3. *Jac. B. R. Curia. Old Book of Entries*, 9. In Play.
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or Bargain.
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If one sell me Clothes, and warrant them to be of a certain length, and they be not so, I may have remedy by this Action. *F N B* 98. 11 *Ed.* 4. 2.

If one sell me a Horse, and warrant him sound wind and limb, and he hath some secret disease known to the seller, and not visible to the buyer; as if he be shoulder-shot, or the like, this Action lieth for this. *Adj. Trin.* 18. *Jac. B. R.* 11 *Ed.* 4.6. 13 *H.* 4.1. But it is held by some it will not lie upon a warranty, when the fault is such as the seller did not know of it. *F N B* 94. But the books are general, and it seems the Law is otherwise. So it is said it will not lie upon the warranty, when the fault is apparent that the buyer may discern it by one of his five senses: As when the seller doth warrant the Clothes to be Red, and the buyer having seen them, and they be Blew; or he doth warrant a Horse to be sound, and he hath a splint, spavie, boyl, or is lame. 13 *H.* 4.2. 7 *H.* 4. 14. 5 *H.* 7.41. 20 *H.* 6.37. 31 *H.* 6.11. So when the warranty doth extend to a thing to come, as that a Horse shall carry a man 30 miles a day. *Finchesley* 188. So when the warranty is made after the thing is sold, and is no part of the contract; and yet such a warranty *ex post facto*, if it be by Deed, may amount to a Covenant. 5 *H.* 7.41. 11 *Ed.* 4.6. *F N B* 98. *Pasch.* 3. *Jac. B. R. Goldsmiths Case.*

If one sell me corrupt victual or wine, as if he mix wine and water, or the like, without any warranty, I may have this Action against him for his deceit. *Kelw.* 91. 11 *Ed.* 4.6. But if one sell corrupt, or false and sophisticated wares, it seems no

Action of the Case will lie upon this Sale without a warranty be made. *Dyer* 75. 76. yet see *Kelm.* 89. 7 *H.* 4. 10. 13 *H.* 4. 1. 9 *H.* 6. 32. 11 *H.* 6. 22. 19 *H.* 6. 49. *F. N. B.* 88. So if one sell me an Horse which is unsound; and I know him to be unsound, without warranty I cannot sue him for this. *F. N. B.* 94. 31 *H.* 6. *Statham* action *Sur. le case pl. ult.* 7. *R.* 2. *monstrance de faite* 160. So if one sell corrupt Wine or Victuals, if the buyer or his servant tast it before hand, and like and accept it; in this case this Action will not lie. 7 *H.* 4. 16. 13 *H.* 4. 2.

If one be about to sell me a Lease, and I tell him that *I. S.* bid me 100. l. for it, and thereupon he giving credit to my report, is moved to give me 100. l. for it, and *I. S.* did never bid me 100. l. for it; he cannot have this Action against me for this falsity, for it was his error to believe it. *Adjudg. B. R.* 41. *Eliz. Taylors* Case.

If one sell me Land or goods that are none of his own to sell, and it is after taken away from me, or I be molested about it by the right owner, I may be relieved by this Action. *Cook* 4. 18. 42. *Aff.* 8. *Br. Act. of the Case* 85. *Fitz.* 4.

If one sell me Land, and agree to make me an estate by a day, and before the day he doth make it away, or some estate out of it, or charge upon it to another, and then doth make the estate to me, I may have this Action for my relief. 3 *H.* 7. 14. *F. T. B.* 98. 20 *H.* 6. 34. 2 *H.* 7. 12.

As for deceit in breaking of promises, we have spoken to it before in an Action of the Case upon an *Assumpsit*.

CHAP. XXIII.

Where an Action of the Case Will lie for other mis-doings, or not doings, or not.

THIS Action of the Case lieth for wilful or negligent misfeasances or non-feasances in all the cases following, viz. If one stop a Ditch or River, or set up Flood-gates, so as to make the water overflow and drown my ground adjoining to it, or stop or divert a Watercourse running to my Mill or House, so that I cannot have that benefit by it I was use to have,

have, I may have this Action for my remedy. *Cook* 4. 86. *Dyer* 248. 320. *Cook* 9. 50. *F N B* 88, 89. 21 *H. 7.* 20. *F N B* 92. But if a man stop or divert water to amend a mans Banks or Mills, having by a custome such a liberty and power; this is justifiable, and will not bear an Action. 39 *H. 6.* 32. *Bro.* 77.

If one do procure another falsely and maliciously to indite me for any offence, or cause me to be arrested, imprisoned, bound over or arraigned for an offence, without any colour or cause of suspicion, I may have this Action against him for my relief. *M. 4. Jac. B. R. Marshams Case Adjudg. Trin.* 17. *Jac. B. R. Olivers Case. M. 7. Jac. B. R. Gambels Case.* See for this in an Action of the Case for a Conspiracy. Yet I have seen the report of a Case, that this Action will not lie but where the party indicted is acquitted upon a Trial. *M. 5. Jac. B. R. Min. vers. Taylor.* But the contrary is practised every day, and therefore I cannot receive that for Law.

Indictment.
Sec. 1.

If one put such things in the water as do occasion the drowning of my Sheep, I may have this Action against him. *F N B* 92. If my Sheep be passing over Severn, and one of the passengers force one of them into the water, and all the rest follow and are drowned, I may have this Action; but whether I shall have damages for all or one only, the Jury must well consider of it.

If one put Cats into my Warren amongst my Conies, it seems I may have this Action against him. *Old B. of Entries, F. 13. M. 2. Jac. B. R.* by two Justices.

If one hinder me of my Execution, as if a Sheriff come to another mans House where the goods of the Defendant are, and the dore of the House being open, another man, not the owner of the House, shut the dore and keep him out; or the owner of the House or any other man convey away the goods, and so prevent the execution; this Action will lie for this. *Adjudg. Hill.* 20. *Jac. B. R. Woods Case. N. B. of Entries, F. 13.* But if it be his own House, or to defend his own goods against the Execution, he may justify it. *Coo.* 3. 91. If I have a Judgement against an Executor, and he do secretly and fraudulently make away his goods to prevent Execution, I may have this Action against him. *M. 2. Cur. B. R. Cur.* If

Hindring my
Execution.
Sec. 2.

Executor.

an Officer be coming to arrest a man, or attach his goods at my suit, and another man convey away the goods or the person, so that he cannot do the work, I may have this Action against him. *FNB* 102. 21 *H.7.40. 18 Ed.3.3.* If a man be arrested at my suit, and another man rescue him, and so he get away; in this case I may have this remedy, and recover the Debt in damage from him. *Hil. 20 Jac. B. R. nullo contradicente. & 7 Jac. B. R. Hawkes Case.*

Removing a
Distress.
Sect. 3.

If another mans Cattel be on my ground damage fasant, and a stranger of his own head remove them, so as I cannot distrain them damage fasant, I may (as it seems) have this Action. *Fincheſly* 200. *Cook* 5. 91. So if I be coming to distrain my Tenant for my Rent, and he hearing thereof, drive away the Cattel, and prevent my distress. *Hil. 20 Ia. per lu. Haugh.*

If I have provided wood for a special purpose, as to make Iron, or the like, and a stranger take it awsy, I may have remedy by this Action. *New Book of Entries*, 36, 37.

Abusing a
Distress.

If one distrain my Kine great with Calf, and by driving they lose their Calves, I may have this Action. *FNB* 86.

Burning a
House.
Sect. 4.

If my Neighbour, his servant, or any other that shall come into his House by his good will and agreement, shall wilfully, or through negligence fire his, and thereby my House, I may have relief by this Action. 2 *H.4.18. Exod. 22.6. Old B. of Entries*, f. 8. But if my Neighbour by negligence, or against his will, and thereby my House is burnt, *contra*. 2 *H.4.18.*

Menacing.

If one threaten me, my wife, servants or children, that he or some other shall do us some hurt, and do afterwards lie in wait to do it, and by this means we be so put in fear that we dare not follow our business; as if my servant by this means dare not go abroad about his work, or depart away out of my service, and I have hereby any particular loss, I may have remedy by this Action. But for a bare threatening without some doing or endeavour, as lying in wait, or the like, no Action will lie. *Cook* 7. 1. *Kelm.* 40. 9 *H.7.7.*

Dog killing
Cattel.

If another man hath a Dog that hath been used to kill Cattel, and the owner of the Dog hath had notice given him thereof, and this Dog happen to kill my Cattel, I may have this Action against the Master of the Dog. *Dyer* 25. *Cook* 4. 18.

Exod.

Exod. 21. 29, 35. 36 H 6. 7. So there must be three things in the Case to bear up the Action; 1. The Dog must be used to bite. 2. The owner must have notice of it. 3. It must be his Dog when he doth it. *Pasch.* 9. *Iac. B.R. Londars Case.* And it was held by Baron *Denham*, and accordingly he gave direction to a Jury, That if *A.* have such a Dog, and *B.* take him out with *A.* without his privity, and then he kill my Cattel, that I may sue *A.* for this.

If one remove a meer-stone, and I be hurt by it, I may have this Action against him that did it. *Old Book of Entries*, f. 9. Removing bounds.

If one stop water, and put it out of his old course, and by that means it surround my ground to my hurt, I may have this Action. *New Book of Entries*, f. 18. Nuisance.

If one take out an Execution upon a Record in any Court, when he knoweth the Record is removed by a Writ of error into another Court, it seems I may have this Action. *Trin.* 39. *Abuse of Justice.* *Sec.* 5. *Eliz. Co. B. Willis vers. Stroud.*

If one cast a false protection, the party delayed hereby may have this Action. *Trin.* 19. *Iac. B.R. 21 Ed. 4.*

If one sue me in a Court that hath not jurisdiction of my person, or sue me for a thing whereof that Court hath not jurisdiction; for this unjust vexation I may have this remedy: As if one sue me in the Admiralty or Spiritual Court for a thing not triable there; or sue me in the Kings Marshalse, when neither of us are of the Kings House; in these Cases this Action lieth: But if one sue me in an improper or unjust Action, this Action will not lie for this; for here I shall have costs in the same sute for my relief. *Cook* 10. 76. *Sta.* 2 H. 4. 11. *Fitz. Essope* 18. 10 H. 6. 13. *Trin.* 3. *Iac. B.R. Dame Waterhouse Case.* And yet if one sue me for Tythes where I ought not to pay Tythes, which is forbidden by the Statute of 32 *Eliz. chap. 7.* I may not have this Action for this. *Adjudge. Partridge Case.* But if one take a false Oath against me in a proper Court, whether he come in, by or without process, and I be prejudiced by it, I cannot have this Action against him. *M.* 38, 39. *Eliz. Co. B. Adjudge. Dampports Case.* *M.* 18. *Iac. B.R. Evers Case.* *Cook* 4. 14. for it is in an ordinary course of Justice, and an act of the Court. Sutes in improper Courts or Counties. False Oath.

If one indict another, or sue an appeal against another in another County then that wherein he dwells, this Action lieth against him for this wrong. *Stat. 8.H.6. ch.10. 6 H. 6. ch.1. Kelw. 21.* So if one sue me in a forreign County, and there secretly pursue me to an outlawrie, I having no notice of it; this Action lieth for my relief. *N. Book of Entries, f. 42.*

If a Prohibition be delivered to a man to stay a sute he hath against me in a Court, and he proceed in that sute notwithstanding, I may have this Action. *F N B 92.*

If a man have a Judgement, and have levied goods to pay the Debt upon an Execution, and the Sheriff return that they are in his hands for default of buyers, and the Plaintiff knowing hereof sues out a new Execution which the Sheriff doth execute, no Action will lie against the Plaintiff for this. *Pasch. 17. Jac. Co. B. Waterer vers. Freeman.* So if one be to pay me money at Michaelmas on a Bond, and pay it, and after I sue the Bond, he cannot have this Action against me. *Pasch. 17. Jac. B. R. per Ch. Justice.*

If a Guardian be to sue for an Infant, and do it not as he should, the Infant may have remedy by this Action. *Dyer 361. Kelw. 135. Brook 118.*

If I be bound to appear in a Court at a day, and before or against the day one cause me to be arrested of purpose and malice to prevent my appearance, and to cause a forfeiture of my Bond; in this case I may have this Action for my relief. *7 H 6. 45. Fitz. 4.*

Between Lessor and Lessee, or Lord and Copyholders. Sec. 6.

If a Lessee for life do make a Lease for years, and this Lessee for years doth commit waste, for which the Lessee for life is punished; in this Case he shall have this Action against the Lessee for years, and recover as much as the Lessor doth or may recover of him. *Pasch. 38. Eliz. B. R. Germies Case.* So if Lessee for years of a house, lease it for part of the time, and that time expire, the Lessee continue in possession, and pull down part of the house, the first Lessee may have this Action. *Adjdg. Trim. 6. Car. B. R.* If the Lessee will not suffer his Lessor to come into the house to see if any waste be done in it, the Lessor may have remedy by this Action. *Hill. 20. Jac. B. R. Adjdg.*

If the Lord cut down the Copyholders trees without his leave,

leave, though he leave the throuds behind him, yet this Action lieth for the Copy-holder against the Lord. *M. 3. Jac. B.R. Crofs vers. Abot*; unless the Lord be by custome to have the trees. & *Trin. 17. Jac. per Just. Haughton.*

If a Tenant at will of a house, or his servant, or his Lessee at will, which is his servant, do voluntarily burn the house, the first Lessor may have remedy by this Action, *M. 17. Jac. B.R. per Ch. Justice.* But if he suffer the house by negligence to be burnt, or the trees negligently to be cut down, no Action will lie for this. *Cook 5. 13.* But in the first Case it seems the proper remedy is to be against the Tenant at will by a general Action of Trespas, and not by this Action; for if he burn, pull down the house, or cut trees, the will is determined. *Dyer 122. 15 Ed. 4. 20. Lit. fol. 15.*

If the Lessor put out the Executors of the Lessee out of their term, they may have this Action. *Co. 4. 18, F N B 92.*

If I be hindred in all or part of my common, private way, or private water, walk or foldage, which time out of mind by prescription or otherwise I have good right unto; I may have remedy by this Action. *N. R. Ent. f. 9, 11, 14. Cook 5. 76. Sect. 7. 13 H. 7. 26. Cook 1 part Inst. 56.* So if the inhabitants of my Parish have by prescription a watering place, and it be disturbed, every one of us may have this Action. *Fin. 187. 27 H. 8. 27.*

If one inclose Land which should lie open in a Mannor, in which the Commoners have Common, or eat up the Common, so that the Commoners have not sufficient, every Commoner may have this Action against the disturber. *Co. 9. 113. 11. 54. F N B 145. 21 H. 7. 40.*

If I have an Office, and another disturb me in it, that I cannot use it; this Action is given me for my relief. *6 Ed 4. 9. Brook 94. Cook 9. 50. F N B 94.* So if one hinder me in my Fair or Market that I cannot have the Toll, or distrain one to come to his Leet that ought to come to my Leet, I may have this Action. *O. B. of Ent. 5. N. B. of Ent. F. 10. 11. H. 4. 64.*

If I and my Ancestors time out of mind have had an Isle in a Church for seats, and funeral of such as dye in my house, as belonging to my house, and the Parson or any other disturb me, I may have this remedy. *New B. of Entries, F. 9.*

If one grant me to have hay and straw in his house for my two Kine all the winter long during my life, and I be disturbed of it, it seems this Action lieth. *Fitz. 17.*

If a Statute forbid a thing without a penalty, and it be broken, and I have any special loss by it, it is thought I may have relief by this Action. *F N B 90. Trin. 3. lac. B.R.*

Escape.

If a Prisoner escape by the Gaolers means, either wilfully or negligently, I may have remedy against the Gaoler; and if he go against the Gaolers will, and he be forced in this Action to make me amends, he may have this Action against the Prisoner for his counter-remedy. *7 H. 4. 14. Broo. 34.*

For spoiling my goods.

If I deliver Goods to *W.* and he deliver them over to *I. S.* to my use, and *I. S.* do impair them, I may have this remedy against *I. S.* *12 Ed. 4. 13. Broo. 96.*

If one cancel my Deed, or mar my goods delivered to him, I may have this Action; and I may have this Action for marring my Deed, albeit the Deed be nought. *O. B. of Ent. f. 7. Broo. 382. M. 9. lac. B.R. Constables Case.*

If one have my Cattel to keep, and they dye by Gods hand, this Action lieth not; nor albeit he promise to keep them safe. *Per Just. Bridgman.* But if one have my Cattel to keep, and suffer them to dye by his negligence, I may have this remedy. *2 H. 7. 11. Dyer 12. Cook 5. 14.*

Pledge.
Sect. 8.

If I pledg my goods for money to another, and at the time of payment of the money I tender the money, and require my pledg, and he will not deliver it, I may have this Action against him. *O. B. of Ent. f. 8. F N B 86.* And if they perish by his default, I may have this Action; but if they perish by accident without any default of his, I can have no Action for this. *D. & St. 129.* If one that findeth my goods doth lose them, or suffer them to be impaired by his default, I may have this Action against him; but if they be left in a house which by chance is burned or falleth, or they be delivered to another to keep, who doth run away with them; in these cases it seems the finder is not chargable for them; but if one find my goods, and they be afterwards hurt or lost by casualty without any default of his, no Action will lie for this. *D. & St. 38. 129.*

and 156.

Upon a Loan.

If one for hire borrow my horse to ride to London, and he ride

ride him further, or side him out of the way, or forwards and backwards, and forwards again, in and upon the right way; in all these Cases I may for this have this Action, and especially there where the horse is hurt. So if the borrower ride him excessively, so as to hurt him. So if the borrower put him into an old rotten house ready to fall, and the house fall down and kill him. So if any one borrow or hire my goods to use to one purpose, and he use it to another; in all these Cases this Action is given to me for my relief. 12 Ed. 4. 8. 13. 21 Ed. 4. 79. D. & St. 129. 128. Cook 8. 146. 2 H. 7. 11. But if one that doth borrow my horse by hard riding make him very weary only, so that he will do no work in a good while after; or if a horse so borrowed dye suddenly without any default in the borrower, in doing that for which he was hired; or if he put him in a strange house which doth casually fall and kill him; in all these Cases no Action will lie. D. & St. 128. 129. Ex. 22. 14. 15. 40 Ed. 3. 6. If one lend me a horse for hire for a time, and he take him from me within the time, I may have this Action against him. F N B 86.

If I be Executor to a man, and the goods be in another mans house, and I come in time convenient to fetch them away, and he do actually disturb me, so that I cannot have them, I may have this Action against him. M. 7. Jac. B. R.

If one take my Beasts or goods from me, and another take them by force from him, I may have this Action against the second taker. 12 Ed. 4. 12.

If I be to have Corn I have sowed upon another mans Land, and be disturbed in it, I may have this Action. For a disturbance and detainer.
Finchesley 187.

If I buy Corn of one, and pay him part of the money, and leave it with him, and pray him to keep it till such a time, and he convert it to his own use, I may have remedy by this Action; and if the Corn were in bags, I may also have a Detinue Detinue: for it. Kelw. 77.

If I leave my goods with one to keep, or I leave them with Bailment. him, and he take them into his custody without any words, and the goods be lost or wasted, I may recover the worth of them in this Action, albeit he be so have nothing for keep-

ing them : But if when he doth receive them he receive them with a special caution and agreement , that he tell the owner he will not answer for them ; or he will keep them as his own , or keep them as well as he can ; in these Cases no Action will lie , unless there be an Assumpsit , and good consideration for it in the Case. *Cook* 4.83.5.13. *Exod.* 22.9,10,11. *Kelw.* 77.12. *Ed.* 4.15.2 *H.* 7.11. *Cook super Litt.* 89. *O.B. of Entries*, 3.9.

Goaler.

If a Goaler use me (being his prisoner) extreamly, I may have remedy by this Action. *F N B* 93.

Ferriman.

If a Ferriman undertake to carry any thing for me over the water , and by his default it doth take hurt , or is spoyled in or after the carriage , I may have this remedy aginst him. *Adjndg. Partridg. Case.*

Carrier.

Sect. 9.

If a common Carrier although he be but newly a Carrier , or carry but for some persons only (if he carry for money) take any thing for me to carry , and do hurt or impair it himself , or suffer it to be hurt by his apparent negligence , as if he overload his horse , and by that means he fall into the water , and so it is marred ; or he drive his horses by night , or out of the way , and is thereby robbed , I may have this Action for my relief. And yet a Carrier by a special agreement in the undertaking of the carriage , may avoyd the Action. If therefore when he takes them to carry , he saith , and agreeth that he will not answer them if they are lost , he shall not be charged , as in case where he undertaketh them generally. *D. & St.* 139.38. *Fitz.* 14.15.

Servant.

If my Baylist that doth keep my Cattel kill them , or cut down my trees , or my Butler break my hamper , or the like , I may have remedy by this Action against them. 18 *Ed.* 4.20.27. *Broo.* 99. Or rather by a general Action of Trespass ; for by this the privy and trust is determined. *Cook* 5.13. If my plowman that hath the charge of my plow , drive so hard as to kill or harm it , I may have this Action against him. 7 *H.* 4.14. *Broo.* 34. If I put a confidence in a man , albeit he come to my goods by my delivery , yet if he be negligent , I may have this Action. As if my Shepheard that I do trust with my Sheep , keep them so carelessly that they be drowned , or turn shabbie by his neglect , I shall have remedy by this Action.

Action. 2 *H. 7. 1. Cook 5. 14.* If one undertake to do a work for me, as to set plants, or the like, and do it deceitfully, I may have remedy by this Action. *Old B. of Entries, f. 13.*

If a Smith refuse to shoe my Horse being requested, or Smith. clie him in his shoeing of him, so that I lose the use of him for a time, I may have this Action against him. 14 *H. 7. 22. Kelw. 40. F N B 94.*

So if a Taylor spoyle my garment in the making of it, or a Taylor. Barber shave me with an unwholsome Razor, so that my face is hurt, or cut my face with any Razor, I may sue him in this Action. And so for other men that undertake to do work of their calling, and do it amiss. *F N B 94. 7 H. 6. 5. Old B. of Entries, f. 2. 46 Ed. 3. 19.*

If an Inn-keeper refuse to lodge me, or herbage my Inn-keeper. Horse when he hath room and may do it, I may have this Action against him; and the Constable of the Town may (if he will) compell him to receive me, unless he can give good reasons for his refusal, as that his house is full, or I have the plague, or the like. 14 *H. 7. 22. Kelw. 50. Dyer 158. 5 Ed. 4. 2. Pasch. 7. 7a. Curia.* But it seems he may refuse the Horse or goods of my man that will not lie there himself. *Pasch. 7. Jac. B. R. Walbrooks Case.* If I lose any thing out of an Inn, or common Hostrie, I may have this Action for my relief against the Inn-keeper or Hostler; and this Action will lie, albeit the Inn-keeper did at the first refuse me, and albeit the goods lost were never delivered to the Host, or he were never charged with it, and albeit his house be full of guests, and albeit I kept the key of my chamber-door my self, and leave open the door my self, and albeit I be robbed by my chamber-fellow, if the Inn-keeper placed him with me. *Cook 8. 32. F N B 95. Dyer 58.* But in all Cases where this Action is maintainable, these things must be in the Case. 1. The thing must be lost. 2. The person to be charged must be a common Host, he must be one that doth receive such. *Cook 8. 32.* For if one leave his Horse with one that is no common Inn-holder, and it be lost, he shall not answer it. *Dyer 266. 158.* And yet if he have but newly set up, he shall be chargeable. 3. The party that lost the goods must be a Stranger

or Traveller; and therefore if it be a friend or neighbour that hath lost it, he shall not have this Action. *Cook* 8. 32. 4. The thing lost must be gone out of the Inn, the house or the stable; and therefore if the owner bid the Hostler put his Horse to grass, and it be lost there, the owner must bear it; but if the Host of his own head put him out to grass, and he be lost, the Host must bear it. *Cook* 8. 32. 5. It must be lost by the negligence of the Hostler, or his servants, as in the cases last before; if the Host or his man put the guests horse to grass without the privity of the guest; if a Horse dye in the stable without any default of the Host or his man, they are not chargeable. *Pasch.* 12. *Jac. Co. B. Whitakers Case.* So if the guest be robbed by his own servant, or his chamber-fellow of his own choyce, no Action will lie for this. *Cook* 8. 32. It must therefore appear that the goods came into his hands. 6. The party that doth lose must be a guest to the house at the time of the loss; for if he be a friend invited to lodge all night by the Inn-keeper, he is not chargeable for this loss. *Pasch.* 7. *Jac. B. R. in Walbrooks Case.* 7. The goods must be lost whilst the owner is there; for if one leave his dead goods with the Inholder, and he do not lie there himself, and the goods are stole, the Host shall not answer them. *Idem.* And yet if it be a Horse or living thing which is lost, by which the Inn-keeper gets, he must answer it. But if a man leave other goods, as Hats, or the like, and the Host saith he will keep them safe, and the guest come not in many days, and these be lost, he shall not be charged. But if the guest go away in the morning, and come at night, *contra. Adjudg.*

Officer.
Sect. 10.

If an Officer take Toll of me where none is due, for my relief herein I may have this Action. *FN B 94.*

If an Officer of a Court get a privilege for one, supposing him to be his servant, who is not so, and is sued by me, and thereby my sure is delayed; I may have this Action against him. 31 *Ed.* 4. 32. It is said by some, that if a publick Officer whose Fee is tendered to him, or recoverable by Law, do refuse to execute his office, that he is liable to this Action. And therefore if a Sergeant at Law refuse to give advice to,

or

or an Attorney to be retained by me, that I may have this Action against him; otherwise it is of a Barrester, for he cannot sue for his Fee. Of this opinion was Justice *Bridgman*, 17 *Car.* If a Sheriff, Bayliff, or any such like Officer do misdeemean himself in not doing, or neglecting or mis-doing his office, the party hurt by this may have this Action, especially if he give him or tender him his Fees before-hand to do it; as if he refuse a Writ, or have a Writ or Warrant to arrest a man, and may do it, and doth it not; the Plaintiff in the Action may have this remedy. *Cook* 9.60. 5.89. *Plow.* 48. So if the Sheriff refuse to return a Writ, or make a false return of a Writ, the party grieved by it may have this Action. 41 *Affize* pl. 12. 21 *Ed.* 3. 43. 10 *H.* 7. 23. *Old B of Entr.* f. 11. So if an Officer make a false Certificate, he that is hurt by it may have this Action. *Cook* 11. 94. Or if the Sheriff refuse to receive a Writ against one he hath in execution, the Plaintiff may have this Action. 41 *Aff.* pl. 12. *Cook* 3. 87. So if the Sheriff have a Writ against a man at my suit, and I shew him the man, & he do not arrest him, I shall have this Action; and albeit it be on the Sabbath day when I do shew him to him, yet he is bound then to arrest him. *Pas.* 18. *Jac. B.R. per 3 Inst.*

If the Sheriff do out-law a man, and do not proclaim him according to the Statute. 10 *H.* 7. 23. *Broo.* 122. Or if he return a man of a Jury that hath a Charter of exemption, and hath given notice thereof to the Sheriff; in these cases this Action lieth. 18 *H.* 8. 5. If the Sheriff or his Bayliff enter upon any Franchise or Liberty to execute Writs, I may have this Action; but the arrest is good, and no false imprisonment lieth upon it. *F N B* 95.

False Imprisonment.

If the Sheriff suffer a man arrested upon an Execution to escape, the Plaintiff in the first Action may have this Action for his relief. 15 *Ed.* 4. 32. *Cook* 4. 95. If the Sheriff proceed in his Court after the Cause is removed into another Court, this Action lieth. *F N B* 99. If the Sheriff or his Bayliff attach goods, and deliver them back again, the Plaintiff in the first sure may have this Action for his remedy. *F N B* 92.

Escape.

If an Escheator had returned any other thing then what was found by the Jury. 9 *H.* 6. 66. *Fitz.* 6. So if an Ordinary

or other Officer doth so, the party grieved may have this Action in these Cases. But all this (as it seems) is to be understood of Ministerial Acts only: For if they refuse to do, or do amiss, or do not their duty in judicial Acts, it is said this Action will not lie. 12 H. 6. 3. 2 R. 3. 9. 10. 12 H. 6. 3. And this difference was agreed by the Court. *M. 22. Jac. B. R. Sed quare*, and study the reason of this diversity. See more of this before in an Action of the Case for a deceit.

Repair.

If there be a charge upon any man by reason of his Tenure of House or Land, to repair any bank, bridge, gutter, or private way, or the like, and he doth it not, and hereby I have a special prejudice, I may have remedy by this Action. *O. B. of Entries*, f. 10. Or if one be bound to repair the Sea or Severn banks, and he neglect it, and hereby my ground is drowned, I may have this Action. *Trin. 20. Jac. B. R.* But in this case if the decay be by an extraordinary inundation or accident, no Action lieth for this. *Cook* 10. 139.

Suit to a Court.

If one that ought to do sute to my Court, or grind at my Mill, pay Toll in my Fair or Market, or to egist my Land with his Cattel, doth refuse to do it, this Action lieth for my remedy. 7 H. 4. 9. 44. 21 H. 7. 16. 22 H. 6. 14.

For not repairing.

If a Lessor do not repair the decays of the housing, having notice, where he is bound to do it, or pay Subsidies, and such things as by Law he ought to do, but suffer it to fall upon the Lessee, or he be prejudiced by it, he may have remedy by this Action. 21 H. 7. 12. 22 H. 6. 14.

For damage-
fasant.
Sec. 11.

If one tack Cattel with me till *Michaelmas*, and the owner suffer them to stay longer, and do not take them away, I may have this Action against him for this injury. 45 Ed. 3. 6. 21 H. 7.

If one buy my Hay in my Meadow, and do not take it away in time, but suffer it to lie so long as to mar the grass, I may have this remedy. *Fitz.* 48. So if I set out the Parsons Tythes duly, and give the Parson notice of it, and he do not take it away out of my house or ground in a reasonable time, but suffer it there to my prejudice, I may have this Action for my relief. *Struckly's Case. Co. B.* 45 Ed. 3. 6. *M. 20. Jac. Denhams Case.*

For disceipt.

If I retain a man to purchase Land for me, and he do it not,

not, but do his endeavour to do it. no Action lieth for it: but if he purchase it for himself, for this I may have this Action.

11 H.6.18. 3 H.7. 14. 17.

If I buy Land, and a stranger hath some of the Writings For detaining that do concern the Land, and the Vender and I request the Writings. and he will not deliver them, it is thought I may bring this Action. *Old Book of Entries, f. 5.*

If one be bound by prescription to make his hedge next to Mounds. my ground, and do it not, and thereby other mens Cattel come into my ground, or I am otherwise damnified, I may have this Action for my relief against him that should make the hedge. *Trin. 20. Jac. B.R.* And so for any such like thing which a man is bound to do, as to help warres out of the Sea with a Crane, or the like. *Old B. of Entries, f. 3.*

If the Parson of the Parish be bound by the Custome to keep Against a Par-son for not keeping a Bull. a common Bull or Boar, and do not, and any of the Parishjonn-ers have any loss thereby, he may be righted by this Action. *Adj. Trin. 36. Eliz. Yaldings Case, Fitz. 50.*

If one ought to say Divine service in my private Chappel, For not saying Divine Service. and do it not, I may have this Action. *Cook 5. 73. 22 H.6.46.* But if it be to be said to a whole Parish, no Action will lie for the neglect or omission. *Cook 5. 73.*

If I be robbed in my travel, I may recover damages for Upon a Rob-bery against a Hundred. Sec. 12. my loss of the Hundred wherein I am robbed, by an Action in the nature of an Action of Trespas on the Case, upon the Statutes of 13 Ed. 1. 1. 2. 28 Ed. 3. 11. 27 Eliz. 13. But for the further opening hereof, these things are to be known:

Wherever this Action is maintainable, there must be these things in the case: 1. The party robbed must with all the speed he can give notice thereof to, and make Hue and Cry at the next Village (be it in the same or another Hundred, or Country) and to some of the Inhabitants dwelling in or near the place where the thing is done. And herein it is most safe for him to give notice to the Inhabitants on that side, which way the Thieves do flee, and to give notice to many of the Neighbourhood. 2. He must bring his Action for it within a Year after the Robbery done, and yet not within forty days after the Robbery done. 3. He must within

within twenty days next before the Action brought, and Test of the Original Writ be examined upon Oath before one of the next Justices of Peace of the County, in or near the Hundred, whether he knoweth any of the parties that robbed him; and if he doth know any of them, then before the Action brought he must be bound by Recognizance before that Justice effectually to prosecute them. 4. The Robbery must be done in the day time; for if it be done after the night is come, and before the day, no Action will lie for it. 5. The Robbery must be on the high-way, for it lieth not for a Robbery upon me in my House. 6. The Felons must be fled; for if any of them be apprehended, although it be by the party robbed himself, the Action fails; but pursuit without taking will not excuse the Hundred. 7. It must be a Robbery on the person; for if a man have tied his Horse to a hedge, and be gone aside to entrust a point, and the while the Thief take away his Cloak-bag, or a Carrier be behind his Horses, and not near them, and his packs be robbed before he come, no Action will lie for this.

And as to this point these things are further to be known:

1. That if my Servant or Carrier be robbed of my money or goods, I may sue; but the Servant or Carrier must be examined upon Oath; and if he will not be examined, I have no remedy; and in these cases a man may be a witness in his own cause; but a man must make a very clear proof that he or a Carrier had so much money, or such goods.
2. In case of the Carrier, if he be robbed of my goods, either he or I may sue, unless the case be such as he is not answerable, as where he doth take the goods upon a special agreement to keep them as his own, &c.
3. If one of the Robbers be not taken within 40 days, it seems the Hundred is chargeable.
4. If it be done between two Hundreds, both the Hundreds and Franchises within them shall be charged with it.
5. If it light upon any persons in particular, they must have help by way of contribution from the rest, by the help of the Justices of Peace.
6. If any default have been in the following of the Hue and Cry by any other Hundred, the Hundred charged with the Robbery may recover half their damage again of the Hundred in default.

default, *Coo. 7. 7. Plaw. 128. 27 Eliz. 13. Trin. 21 Jac. Francis Forsters Case, Dyer 370. 13 Ed. 1. 2. 28 Ed. 3. 11.*

We have been long upon Actions of the Case, because they are very common, and the knowledge thereof is very usefull. We shall now go on to some others.

CHAP. XXIV.

Of an Action Populer, and an Action upon the Statutes

AN ACTION Populer, is an Action given upon the breach of some Penal Statute, the which every man that will, may sue for himself and the King, by information or otherwise, as the Case and Statutes are; as the Writ called *Decies tantum* against a Juror that takes money to give his Verdict, is of this nature, and many others there are. What it is.

An Action upon the Statute, is a Writ founded upon a Statute whereby an Action is given to one in a Case where no Action was before, as where one doth commit perjury, or make a fraudulent Conveyance to the prejudice of another, in this case he that is hurt may have this Action upon the Statute and his case. The difference between this and an Action Populer, is that the Action Populer is given to the King and whomsoever will sue: But this is given to the King and the party grieved only, and none other person can bring the Action. And where the Statute doth run thus; That the King shall have the one moiety, and he that will inform (and not the party grieved) the other moiety, this is an Action Populer that is given by the Statute. And this Action when one hath begun another cannot pursue it, *Terms of the Law.*

Action Populer.

Where a Statute gives an Action for a Forfeiture to the King and to the party grieved, if the King begin the suit first then the party grieved cannot sue, but the King shall recover the whole Penalty. And it seems also that he may release the Forfeiture to the Offender before the Informer begin his suit, and thereby bar the Informer for ever, *Crompt. Jur. f. 21. 38.*

Release.

When it must
be brought.

All these Actions which shall be brought for any Forfeiture, upon any penall Statute by which the Forfeiture is given to the King, shall be brought within two years after the offence done, and not after. But if the forfeiture be given to the King and the Informer, then it must be brought by the Informer within a year next after the offence committed, and in default of the Informer by the King within two years after the end of that year, otherwise that it shall be void. But when any Action is limited by any penall Statute to be brought within a shorter time, there it must be brought within the time limited by the Statute, 31 *Eliz. ch. 3.*

CHAP. XXV.

Of a Writ of Admeasurement.

What it is.

THERE is a Writ called Admeasurement of Pasture. And it lieth where many Tenants have common appendant in another mans ground, and one of them overchargeth the Common with over-many Beasts; then all, some, or one of the rest may have this Writ against all the rest that do not joyn in the Writ to Admeasure them all. This Writ lieth not for or against Commoners that have common appurtenant or in grosse, but for and against such as have common appendant, and because of Neighbourhood. Nor doth it lie for or against the Lord, but some other remedy. And there is a Writ called admeasurement of Dower, and lieth where a woman is endow'd by an Infant or by a Guardian of more then she ought to have, in this case the heir shall have this Writ, by the which the woman shall be admeasured, and the heir restored to the overplus. But this Writ lyeth not against an Abator, but some other remedy, *Terms of the Law.*

CHAP. XXVI.

Of an Attachment and Distringas, or Distresse.

What it is.

THIS is a Writ the which doth sometimes lay hold of mens bodies, and sometimes of their goods, and sometimes

times on both, and it is for the most part granted after some neglect or contempt of appearance in some Court. It is the Writ or Warrant commonly used in County or Hundred-Courts, or Court-Barons. And this differeth from the Writ called a *Distringas* or *Distresse*, which doth alwayes take hold of mens Lands and goods, and is a Writ to the Sheriff to distrain his goods and Cattels, and sometimes the profits of his Land for his appearance in a Court at a day: And this is the first Writ in every personal Action: And this Writ doth never meddle with the persons, *Finchesley* 9 H. 7, 6. *Terms ley, Distringas*. But both these Writs are to go *in infinitum* till the party appear: Where a man is attached by his goods out of any Court for lack of appearance: and if it be out of the County-Court, the Sheriff may either take them away, or leave them with the owner, and which of them soever he doth, the property is in the owner till he make default at the next day of appearance, 9 H. 7, 9. 27 H. 6, 2.

Any Cattel or goods personall of the owners own goods, who maketh the default, are distrainable. But no goods of another man in his custody are attachable; nor are such things of the owners as are real or parcell of the Freehold distrainable, as Wards, Writings, a Diers fat, a fornace fixed, a Table dormant, or Wainscot fixed, or any such like thing attachable, 9 H. 7, 9. 27 H. 6, 9. 7 H. 6, 10. *Hill*: 37 *Eliz. Co. B. Dyers Case*. And finally, whatsoever is distrainable for Rent is attachable, and whatsoever is not distrainable, is not attachable. See for this in *Distresse*, Chap. 35. Sect. 5.

What things are attachable or not.

CHAP. XXVII.

Of a Writ of Annuity.

THis word *Annuity* is sometimes taken for a yearly payment of a sum of Money, or other thing granted to another in Fee for life or years charging the person of the grantor only: And sometimes it is taken for the Writ whereby it is recoverable, if it be not paid, *Terms of the Law. New B. of Entries* ff. 49. *Com upon Lit.* 144. v. And this a man may have al-

What it is.

The difference
between this
and a Rent.

so by Prescription which was at first by grant, *N. Book of Entries, f. 48. Cook Super Litt. 144. Cook 6, 58, 10, 93. Plow. 13.*

This differeth from a Rent in many things; For, 1. A Rent doth alwayes issue out of Land: But an Annuity is not issuing out of Land, but doth charge the person (to wit) the grantor, or his heirs which have Assets by descent, if there be no speciall provifo in it, that it shall not charge his heir. 2. For an Annuity no distrisse can be taken, nor other remedy had but this Writ against the grantor or his heirs (or successors, if the grant be by a Corporation.) 3. This Writ never lieth against the taker of the profits, but only against the grantor or his heirs; But for a Rent the same remedy is in many cases against the Tenant of the Lands, and against him that taketh up the Rent wrongfully, as it is against the grantor or lessee. 4. In this Writ the party that sues shall recover all the Arrerages behinde, and when once he hath a Judgement in this Action, so long as this is of force, he shall never have any new Action against the party: But a *Scire facias* out of this Judgement: but it is not so for a Rent. But when the Annuity is determined, the party to whom it is due may have an Action of Debt for what was due before it was determined, *Cook upon Lit. f. 144, 145, 150. Cook 7, 9. FNB, 15, 23. Cook 6, 45. Dyer 26, 377.* But in this they agree, that an Annuity is in most cases grantable as a Rent is: But if an Annuity be granted *pro Consilio impendendo*, this it seems is not grantable over to another, unlesse it be granted to the Grantee and his Assigns, for then it is also grantable over, *Cook 7, 27, 28.*

Debt.

Where this
Writ lieth, and
for and against
whom, and
where not.

This Writ lieth not only for the Grantee, but for his heirs, and for his and their Grantee also. But if a Rent-charge be granted to a man and his heirs, he shall not have a Writ of Annuity against the heir of the Grantor, albeit he have Assets, unlesse the grant be for him and his heirs, *Cook upon Lit. 244. Dyer 65, 344.*

If one grant a Rent or summe of money out of his Cofters or out of his Land, and say not what Land nor where, this is an Annuity, *Lit. 48.* So if one grant to me a Rent-charge out of another mans Land, this shall be an Annuity, *Cook 6, 58.* So if one grant a Rent to me out of such a thing as is not chargeable

chargeable with a Rent, as out of a Rent, a Fair, a Franchise, or out of his gains in his Trade, or the like; in all these cases, this will amount to an Annuity, which shall charge the person of the Grantor, and the persons of his heirs, if the grant be for him and his heirs, *Cook* 6. 58. 10. 93. *Coo. super Lit.* 145. 150. *Trim.* 17. *Jac. Coo. B. Smiths Case.* If one grant me a Rent out of his Lands, and after his Land is recovered from him by an elder Title, this now is turned to, and shall continue an Annuity recoverable by this Action, *Cook upon Lit.* 148. So if a Tenant for anothers life of Land grant a Rent out of it for xxj years, and the life die, yet it shall continue an Annuity to charge the person of the Grantor during the term, *Cook upon Lit.* 148. But if one make a Bond or Statute with a Condition or Defeasance to pay a yearly summe, this is no Annuity, nor doth this Action lie for it. So neither upon an *Assumpsit* to pay a yearly summe of money.

Of a *Capias ad valentiam*, *Warrantia Charta*, and those Writs which concern warranty. See my *Book of common Assurances*, Chap. 8. of Warranty at large.

CHAP. XXVIII.

Of an Audita Querela.

IT is a Writ lying where one is bound in a Statute Merchant, Staple or Recognizance, or where a Judgement is given, or like to be given for Debt or Damages, or the party in execution, and he hath a Release, or some other sufficient discharge for all or part of the duty, but hath no day in Court to plead it, nor means to make use of it: in these Cases he may have this Writ for his Relief, *Cook super Lit.* 190. *Finchley* 14. This Writ lyeth for the party himself against whom the Judgement is given, by whom the Statute is made, or his Heir, Executour, or Administratour upon whom the charge is come or coming. And sometimes it is to be had against the prosecutor himself, and sometimes against him, and others that ought to bear a part of the burthen with him, *Kelm.* 25. *Brook* 38.

What it is.
Sec. 1.

For & against
whom it lieth
or not.
Sec. 2.

It lieth against a Terre Tenant without naming him, party or privy, *FNB. 104. 12 H. 4. 16.*

If an Obligee have a Judgement against the Heir of the Obliger, and his Land in extent, and the Obligee assign his estate in it to a stranger, and after the Heir get a release of this Judgement from the Obligee, he may have this Writ against the Assign, *Adjudg. p. 7. Car. B. R. Flowers Case.*

The proceeding in it.
Sect. 3.

Superseas.

If this Writ be brought before execution by the party, his Heir or Executor, he may upon a surmise of good cause for this Writ, and upon Bail given to prosecute and stand to the Judgement of the Court, have a *Superseas* to stay execution. But when the party is in prison, then it seems there is no bail put in till the Comisee answer in the *Audita Querela*. And after Execution is done, it seems no *Superseas* lieth. The other Proses before execution are a *Venire facias* with an *Alias*. And then if he come not in, it seems the party in prison upon a motion may be discharged. And after a *Distingas*, and upon a default after appearance, and a Plea pleaded a *distingas ad audiendum judicium*, for by such default Judgement shall be given against him, and after execution the proces is *Scire facias*, when the party is in prison on a *Cap. sat.* But when he cometh in *gratis*, *Contra. Dyer 339. 22 H. 6. 56. 2 H. 7. 12. 25 H. 6. 34. 15 Ed. 4. 5. Fitz. 5, 6, 7.*

It seems a stranger as a purchaser of Land from the Cognizor of a Statute, or the like, that he shall not have a *Superseas*, *Fitz. 8. 19.*

If one Purchaser sue to have contribution of another Purchaser, and this other hath a discharge by release, a *Scire facias* shall go against the Cognizor that made the release to try that Deed, *Fitz. 19.*

If a man put in bayl, he shall not be discharged of this bayl, but must continue it till the Suit by the *Audita Querela* be determined; for albeit the party do not prosecute after the appearance of the Defendant, yet he must continue in prison, or stand upon his Bayl, *Fitz. 2.*

If a man be Non-suit in one *Audita Querela*, yet he may have another. But he shall have no *Superseas* in the second, as he had in the first, *Fitz. 11.*

In

In all cases, where this remedy is given, there must be these three things in the Case. 1. There must be a charge and burden come, or coming upon him that is to have it. 2. It is such as by Law he ought to be discharged of in all or part. 3. It is such a Case as wherein he hath no other remedy for his relief, *Coo. 4. 30. 3. 34. Dyer 286. 20 H. 7. 30. Plow. 72. Dyer 50.* as in these following cases. If a Judgement or Judgement and Execution be had against me, and the Plaintiff release me of the debt *in facto*, or I be released of it all, or part of it in Law, and yet he sueth out execution, *Cook 8. 152.* So if a Judgement be had against me and another, and one of us are taken in execution, and after released of the debt, or discharged of the execution by the party himself, the other may have advantage of this, *Pasch. 40 Eliz. Cook B. Monk ver. Brown.* So if Judgement be against two Trespassors, and one taken, and the damage satisfied by him. So if a Judgement be against two or more upon one Bond, and execution is done upon, and satisfaction made by one of them, *Trin. 3. Jac. B. R.* But if the Release be in Law, an insufficient Release to barre the duty, *Contra, Broo. 37.* As if an Administration be granted to one, and he sueth a debtor and hath judgement, and after another covenantly sueth out an administration to him and the first administrator, and the new administrator alone releaseth the debtor, this is not a good discharge, nor can he have this Writ, *Coo. 6. 19. Dyer 339.* If Executors sue for and recover a debt, and after the Testament is revoked; in this case the party that hath paid the money, may get the same certified by the Bishop, and then he shall have this remedy against the Executors, *Coo. 8. 144. Dyer 203.* So if one be in execution, and the Sheriff or the Plaintiff set him at liberty, whereby the debt is discharged, and after he take him again, the Plaintiff may have this Writ. But if he did escape against the Sheriffs will, *Contra, Coo. 3. 44. Coo. 8. 21. 141.* If the Plaintiff have a Judgement to recover the money upon the Sheriff upon an escape suffered by him, and after the first Judgement (from the Execution whereof the escape was) is reversed for error, or the party be taken again, after the Judgement is reversed, in these

Where it lieth, or not, And how.

Sec. 4.

To avoid a judgement or execution.

these cases the Sheriff may have this Action. But till the first Judgement be reversed, though there be never so much error in it, yet the Sheriff can take no advantage by it, *Coo. 5. 90.* So if an Obligee have a Judgement upon his Bond and Land, extended upon the heir, and after he assign the Land, and then release the debt to the heir, the heir may have this Writ against the Assignee, *Pasch. 7. Car. B. R. Adjudg. Flowers Case.* If one be out-lawed after Judgement, and imprisoned upon a *Cap. utlegatum*, and the Sheriff doth let him go at liberty, and the Plaintiff doth take out another *Cap. utlegatum*, upon which the Sheriff doth return a *non est inventus*, and the Defendant doth finde error in the Exigent, upon which by sentence of the Court it is adnulled, after the Plaintiff doth take execution upon the first Judgement; in this case the party cannot have this Writ. But if the Exigent had been well awarded, *Contra, Cook 8. 142.* But in all these cases if the party have good matter of discharge, and have a day to plead it in barre, and do not, as when a *Scire facias* is sued out upon a Judgement; and the party having then a release or other matter of discharge, and do not plead it, in this case he shall not be releevd by this Writ. But if he had no warning upon the *Scire facias*, as if the Sheriff do return a *nihil*, in this Case he may have this Writ for his relief, *Finchesley 114. Fitz. 25.*

If a Widow of a Copy-holder in Fee, that claimeth dower by the custom of the Mannor, recover the same in the Lords Court, and 50^l in damages, where in truth there is no such custom, and the recovery is erroneous, the party grieved may have this remedy to prevent execution, and to be restored to his damages, if they be taken, *Cook 4. 30.*

If in a Detinue for a Statute the Defendant pray Garnishment, and the Plaintiff recover against the Garnished by an erroneous Judgement, and thereupon the Defendant deliver the Statute to the Plaintiff, and he hath execution, and afterwards the Garnishee doth reverse the Judgement, it seems though execution cannot be avoided, yet the party grieved may have this remedy, *Trin. 3. Jac. B. R.*

If the Cognissee of a Statute or Recognisance, purchase part of that Land which the Conusor had at the time or after

To avoid a
Statute or Re-
cognisance.
Sect. 5.

ter

ter the Recognisance entred into, and another man doth purchase another part, and the Conusee sue the execution upon the Land in the hands of the other Purchaser; he shall have this Writ to discharge himself, for in this case he is not to have contribution as one purchaser is to have against another, besides the Conusee himself, *M. 36. 37. Eliz. Co. B. Charnocks Case*. And if the Conusee after execution of body and Land, purchase part of the Land of the Conusor, or part of it descend upon him, he shall have this Writ to discharge the body of execution, *Plow. 72. Fitz. 15, 16*. But if the Conusee purchase part of the Land of the Conusor before execution, and after sue execution, in this case the Cognisor cannot have this Writ, for this is no discharge, *Plow. 72*.

If after a *Scire facias* sued upon the Statute, the Conusor get a Release from the Conusee, of all or part of the Debt, and yet he goes on to sue, or to Execution, the Conusor may have this remedy, *Dyer 50. Finch. f. 114*. But if he have the Release before the *Scire facias* sued, he must see and plead it.

If a man enter into a Statute or Recognisance, which either is defective in it self, or is voidable by some Law, as because the Contract is usurious, or there is a defeasance upon it which is kept, or the Statute is delivered up by the Conusee (which is a Release in Law) and the Conusee get it again, and the Conusee doth go on in the Execution of it; in all these cases the party grieved may have this Writ for his relief, *Dyer 35. Pasche 7. Jac. B. R. Corsets Case. vers. St Rowland Lacy. Dyer 297. 22. Ass. pl. 44. Br. 36. 31. 43. Ass. pl. 18*. So also it seems if the Statute were made *per Dures. Fitz. 27*.

If the Conusor after Execution tender the money due upon the Statute to the Conusee, and he refuse it; or if part of it were paid at the day, and he tender the rest in Court, and yet the Conusee go on to extend it, in these cases the party grieved may have this remedy, *Fitz. in toto. Aud. Quer.*

If the Statute were delivered to a stranger to keep till certain conditions be performed, and he deliver it to the Conusee, or he doth get it by fraud from him, before the conditions be performed, in this case he shall be relieved by this Writ, *Fitz. 15, 16*.

If the Sheriff in doing execution upon a Statute, deliver the Lands of a stranger in Execution, instead of the Lands of the Cognitor, it seems this Action lieth not for him, but an Affize, or some other for his relief, *Fitz. 6.*

If the Conusor of the Statute surmise that the Conusee and he have agreed, and that the Conusee hath delivered him the Statute for an acquittance, and because he hath him not to shew cancelled, he doth pretend that that which is sued is forged, this Writ lieth not in this case, *Fitz. 9, 10, 22.*

To prevent a
Judgements.
Sect. 6.

If one binde himself and his heirs, by an especialty, and the obligee sue it, and recover against the Heirs, and after sue the Executors for the same cause, or *e converso*, after he hath recovered against the Executors sue the Heir; the Heir or Executor may have this remedie, for he cannot plead it in Barre, *Plow. 439.* So if a Lessee covenant for him and his Assignes to repair the Houses, or to do any other thing chargeable upon him after assignment of his Estate, and he assign his Estate, and after the Lessor (who may sue either of them) sue and recover against one of them; in this case, if after he sue the other for the same cause, he may have remedie by this Writ, *Broo. 74.*

If divers be bound by one specialty, *Conjunctim & divisim*, and the obligee get Judgement and Execution against one of them, and after sue the Especialty against the other, he may have this Writ for his relief, *Coo. 5. 87.* So if in the *interim*, between the Verdict and the Judgement, the parties have put themselves into Arbitrement for the suit, or the Defendant get a Release from the Plaintiff, and yet the Plaintiff doth proceed, the Defendant may have this Action. But then it seems in this and such like cases the Judgement must be given before this Writ be brought, *21 H. 7. 33. 11 H. 7. 10. Fitz. 7. 13.* So if one have had once Judgement and Execution for a thing, and after sue for the same thing again, *9 Ed. 4. 50.* So if one take my goods from me by my delivery, and another take them from him, in which case both of us may sue him for them; if one of us sue, and recover against him, and after the other sue; the party sued may have this remedie, *5 H. 7. 15.*

If

If an Infant enter into a Statute he may avoid it, whiles he is in his Minority by this Writ, and the course is this; he being in prison, some of his friends sue out this Writ to the Justices, who thereupon send to the Sheriff to bring the Infant into the Court to be seen, and if the Judges judge him to be within age after Proccesse sent to the Conussee, they discharge him, *Fitz. 26.* But if the Infant be sued upon it after he is of full age, this Writ doth not lie for him, *Dyer 231.*

If one alone be charged, or about to be charged upon a Judgement, Statute or Recognizance, and others ought to contribute or bear part of the burthen, he that is, or is like to be charged, may have this Writ for his relief. As for example, if one man enter into a Statute, and after sell his Land to divers Purchasors, or a Judgement be had against one man who doth leave his Land to divers Heirs, or one binde him and his Heirs by an Especialty, and leave his Land to descend to divers Heirs; if one of the Purchasors in the first case, or one of the Heirs in the two last cases alone, be, or be like to be charged; he may have this Writ against the rest, and hereby they shall be forced to be contributory. And if any one of them have a good Release, or other discharge, this (as it seems) will discharge him and all the rest of the whole burthen, *48 Ed. 3. 5. Fitz. 38. Coo. 3. 12. 44. Coo. 6. 13. Fitz. 3.* But if one after he hath entred into a Statute or Recognizance, do convey some of his Lands only to divers persons, and keep the rest in his hands, and the Conussee sue Execution only upon the Land he hath in his hands against him (or his Heir after his death) in this case neither he nor his Heir can have this Writ to have contribution of the Purchasors. But if Execution be sued against any one of the Purchasors, he may have this Writ against the Heir and the rest of the Purchasors, *Coo. 2. 92. Dyer 322.*

To have contribution. *post 189*
Sec. 7.

CHAP. XXIX.

Of a Capias, Exigent and Proclamation..

What it is.
How many
kinds there
are.

A *Capias* is a Writ to take the body of a man, and of these there be divers kinds: Some of which are process that issue out before Judgement is had in the suit, and some issue out after Judgement is had. Those which issue out before Judgement, are a *Capias ad Respondendum*, *alias Capias*, and *pluries Capias*, and *Capias Ut legatur*. Those which issue out after Judgement, are *Capias Pro fine*, *Capias ad Satisfaciendum*, *Capias ad Computandum*. For the two first of these, see *Execution*: and for the last, see *Account*.

Capias ad Respondendum,
What it is.

This is a Writ issuing out in a personall Action after the distress, which is the originall Writ returned, to take the body of the Defendant, for after the Sheriff hath returned upon the original *Distingas*, *Nihil habet in Balliva*. &c. then this *Capias* doth issue forth, and after a *non est Inventus* returned, there goeth forth an *alias Capias*, and after a *non est Inventus* returned, thereupon there goeth forth a *pluries Capias*, and all these to take the body of the Defendant. And then after a *non est Inventus* returned upon the *pluries Capias*, there goeth forth an Exigent and Proclamation, which are Writs lying where a man doth sue an Action personall, and the Defendant cannot be found, nor hath he any thing within the County, whereby he may be attached or distrained, then these Writs do go forth to the Sheriff to make Proclamations at five Counties, one after another, and once in the open Sessions, and once at the Church door where he doth or did late dwell, that he appear, or else that he shall be out-lawed, the which if he be, he doth forfeit all his Goods and Cattels. And this is had sometimes before Judgement, and sometimes after Judgement. Before Judgement it cannot be had, till first there have gone forth three *Capias ad Respondendum* one after another. But after Judgement it doth issue forth after the *Capias ad Computandum*, or *Capias ad Satisfaciendum*: So after the first *capias*, upon an Indictment of Felony, this may be had, *Stat. 18. Ed. 3. ch. 5. 6 H. 8. ch. 4. 31 Eliz. ch. 12. Con. 3. 12. 5. 88.*

Exigent and
Proclamation
what they are.

And

And if the Defendant doth not appear, then there doth issue forth a *Capias Utlegatum*, which is generall or speciall. The generall *Capias Utlegatum* is a Writ directed to the Sheriff lying where an Exigent and Proclamation hath been sued out, and the party having been duly required to appear, and he appear not, and thereupon he is out-lawed by the Judgement of the Coroners to require the Sheriff to take and imprison his body, till he answer for this contempt; and hereupon he is to be imprisoned without Bail or Mainprise. A speciall *Capias Utlegatum*, or *Capias Utlegatum & inquiras de Bonis & Catalis* is to require the Sheriff, not only to take his body, but also to enquire what Lands, Goods and Cattels he had, at or after the time of the out-lawry, and to seize them to the use of the Common-wealth, being forfeit to him by the out-lawry.

Capias Utlegatum, what it is.
How many
kinds there
are.

It is a Writ issuing out in case, where a man is fined for an offence in some Court of Record, in which case he is to be imprisoned of course, and then this Writ is to apprehend him and keep him in prison till the Fine be paid, *Terms of the Law*.

Capias pro fine,
what it is.

CHAP. XXX.

Of a Contributions faciendæ.

IT is a Writ that lieth where many are by Law to do something, and the burthen of all is laid upon one, in this case he may hereby compell the rest to be contributory: As if there be Jointenants or Tenants in-common, that hold *pro indiviso* of a Mill, and it fall to decay, and one or some of them will not join nor help to repair it; by this Writ they may be enforced to it: so if there be many that have Land subject to the charge of a Statute or suit of Court, and one is forced to do all the suit, or to bear all the burthen of the Statute, in this case he may enforce the rest by this Writ, *Terms Ley FNB*,

What it is.

ant 189.

CHAP. XXXI.

Of a Writ of Covenant.

What it is.

A Writ or Action of Covenant is where a man is bound by a Covenant in a Deed, and hath broken it: in this case the party grieved shall have this Writ, and therein shall recover Damages for his remedy. But of this Action, for and against whom, and in what cases it lieth, and all the learning touching it, See it at large in my Book of Common Assurances, chap. 7.

CHAP. XXXII.

Of a Curia Claudenda.

What it is.

IT is a Writ lying for one man against another, who hath a ground next adjoyning to his ground, and he ought by prescription time out of minde to make up and keep the Inclosure, to divide the grounds, and doth not: in this case the party grieved may have this Action for his relief, and force him to it, *FNB*, 127, 128. *Dyer* 38. 52. 295. But he that brings this Action must have the Free-hold of his ground, the which by the Inclosure ought to be fenced and divided, otherwise if he have but a Lease for years, he cannot have this Action, but he must have an Action of the Case, *Pasch. 7. Jac. Co. B. Ingrams Case*.

CHAP. XXXIII.

Of a Decies Tantum.

What it is.

IT is a Writ lying against a Juror in any Enquest, when he taketh money or other reward of the one party, or the other to say his Verdict upon his side, in this case he shall for five ten times so much as he took, which must be divided between the Common-wealth, and the party that will sue for it, in the Name of the Keepers of the Liberty of England, *Termes ley* 123. *FNB* 171. It lieth also against Embracers that shall procure such an enquest to be given, *Crompt. Jur. chap. 38*.

CHAP.

CHAP. XXXIV.

Of a *Dedimus potestatem*.

IT is a Writ or Commission lying where a man sueth, or is sued, and is not able to travel to the Court at *Westminster* to do something there necessary to be done by him. In this case he may have this Writ directed to some Gentlemen of the Countrey, giving them power to admit some man for his Attorney, or to accept of him in the doing of that thing in the Countrey. And at this day it is usually granted to all other men as well as those that are disabled to travel. And it is granted to take the Conusance of Fines, to make Attorneys for the suffering of a Recovery, to take Answers, Confessions, Examinations of witnesses, and other things, as the cause requireth, *Termes ley 57*. The Conusance of a Fine by this Commission it seems may be taken in any place as well as in the County where the Land lieth, *Dyer 220*. What it is.

If a *Dedimus potestatem* be granted to take the Conusance of four, or of a man and his wife, the Commissioners may by vertue thereof take the Conusance of any of them, or of the husband only, and this is good, and a new *Dedimus potestatem* shall be afterwards made and annexed to the Conusance accordingly, 39, & 40 *Eliz Curia Coo. B.*

CHAP. XXXV.

A Distresse though it be not a Writ, yet it is of the same nature, use and end as a Writ is, to wit, to give relief to a man wronged, and the final cause of it is, that by the taking of it, the party distrained, which is the wrong-doer, may be forced either to satisfie the debt or duty to the party distraining, or else to answer him in a course of Law. We have therefore pertinently inserted this Title and learning amongst the rest, as followeth. What it is. Sec. 1.

A Distresse is either said to be real (i.) when Land is distrained upon a *grand Cape*, or a *petit Cape*, of which we have nothing to say here. Or it is said to be personal, where any movable things are distrained. And this is that we are to speak unto. And so a distresse is where one doth take and distrain the beasts, cattell or other things of another man in some ground or place for debt, rent, or other duty behinde, or for some wrong or damage done, the which being taken is to be kept in pound, untill the party that distrained be satisfied his due rent or duty, or it be gotten out of the pound by order of Law, *New terms of the Law, 155. Broo. 146. Broo. pledg. 31. Finches ley 135. Cod. upon Lic. 97.*

After a Distresse is taken and impounded (be it taken of common right, or by prescription, or by agreement of the parties) it is then said to be *in custodia legis*, so that now as the owner hath not the possession of it, so he hath not an absolute property in it, and therefore during that time he can neither give, sell, or forfeit it, or subject it to execution, and therefore it may not be taken as forfeit, or in execution by the Common-wealth, or any other, unlesse they will satisfie the duty to the distrainor first of all. But it must lie for him as a pledge to be a means to help him to his debt or duty; and cannot be taken away and disposed to any other purpose, nor can the Proprietor lawfully come by it himself by any means after it is once impounded, but by agreement with the party, or by a Replevin.

If one seised of Land in Fee, devise it to one on condition to pay to his wife 3^l rent yearly, and if it be behinde, that she shall distrain for it, in this case it seems she may distrain for this rent, *Dyer 348.*

If one make any estate of Land in Fee-simple, Fee-tail for life or years rendring rent, or grant a rent so by Deed, and in either case by apt words reserve a power to him that makes the estate, or him to whom the rent is granted to distrain upon non-payment of the rent, in that case the party to whom the power is given may distrain accordingly, *Broo. 70.* But after the estate upon which the rent is reserved is ended, the party to whom the Distress is given cannot distrain, but must

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What shall be said to be a lawfull Distresse, and lawfully taken or not.

Sect. 3.

In respect of the persons distraining, distrained, or cause of the distresse.

lie to some other remedy, 14 *H.4.31. Doc. & St. lib. 1.* If one grant the reversion of Land leased for life or years rendring rent, or grant a rent out of it; in these cases the Tenant cannot be distrained, nor the Land charged till the particular estate be ended, and then the Grantee or Lessor may distrain for all the Arrerages, 10 *Ed.4.4.* If one seised of Land in Fee take a Wife, and then charge it with a rent, the Grantee cannot distrain for this upon that part which the Wife hath for her Dower, *FNB, 150. Broo. 72.* no not if it be a charge to the Common-wealth, *Coo. 1. part. Inlt. f. 31.*

Wife.

If a Rent or a Seigniorie for which a Distress lieth be divided between the Wife for her Dower, and the Heir after the Lords death, each of them may distrain for their parts, *Broo. 45.*

Apportionment of a distress.

If Rent descend to Heirs that are Partners, no one of them as it seems can distrain for a part till partition made. But then it seems he may, 34 *Aff. 15. 22 H.6.58.*

If one have the sixth part of a ground in common with another, and grant a charge out of it, and after he and the other levy a Fine of the whole to a stranger; in this case it seems the Grantee may distrain the strangers Cattell for all the rent before and after the Fine, and yet before the Fine levied, he might not have distrained the Cattell of the other Tenant in common, but of the granter only, *M. 18 lac. B. R. per Ch. Justice, 26 H.8.5.* If one Joyntenant grant a Rent-charge out of the Land, or make a gift in tayl of the Land rendring Rent, and the Rent is behinde, the Cattell of the other Joyntenant cannot be distrained for it, 33 *H.6.35. 35 H.6.39.* If *A* and *B* be Tenants in common, and *A* lease his moiety to *C* for years rendring Rent, and *C* lease it to *B*, and the Rent is behinde; in this case *A* may distrain the Cattell of *B* (the other Tenant in common) for it. *M. 18 lac. B. R. St. Henry Snelyars Case.* One Coparcner may distrain upon another for a Rent allowed to him to make an equality of partition. 11 *H.4.5.* If a Rent be devised by Will out of Land to *B* for the life of *C*, and the Devisor die, and after the Heir make a Lease of the Land to *B* for life, the remainder to *E* in Fee, and the Rent is behinde in the life time of *B*, and he dieth: in this case *E* may be distrained for this Rent, and all the Arrerages, *Coo. 5. 18.*

Cc

If

Damage-fesant.

If the goods of another man be upon my house or ground, cumbring it, or the Cattell of another man without lawfull authority from me, be upon my ground feeding, treading, or otherwise spoiling the Corn, Grasse, wood, or other thing there-upon, I may as soon as ever they come there, distrain them, and put them in the pound, and this notwithstanding the owner do pursue them as soon as ever they do come in to fetch them out again, and this is called a distresse *Damage-fesant*, *Terms ley* 119. 7 *H.7.1.* 22 *H.6.37.* *Kelm.* 96.

Commoner.

This distresse *Damage-fesant*, any Commoner may take in the ground wherein he hath Common, and if the Lord make a feoffment of part of the Common, leaving enough besides, and the Feoffee do not inclose it, but suffer his beasts to go upon the rest of the Common, the Lord may distrain them. *Cook* 9. 112.8.78. *Dyer* 372. *FNB* 128. If a Commoner surcharge, his fellow-Commoner may distrain his Cattell, *Coo.* 7.23. If there be many Jointenants of Land, and a strangers beasts are there *Damage-fesant*, it seems any one of the Jointenants may distrain them, 11 *H.6.3.* *Broo. Charge* 39. And he that hath but a bare possession only and no title, may justifie the taking of such a distresse, *Plow.* 431.556. The goods or Cattell which come in lawfully at the first, yet may do trespass after ward, and be distrained *damage-fesant*, as where a Lessee keeps his goods or Cattell upon the Land after his estate is ended, *Kelm.* 96. or when a man doth set out his Beast at 12^d a week to tack, and after he with whom he doth tack him, doth give him notice that he will not keep it any longer, and yet the owner of the beast doth not fetch him away but leave him there, 43 *Edw.* 3.21.

Executor.

Lands charged with a Rent in the hands of the Commonwealth, cannot be distrained for others, whilst it is in their hands there is no remedy, but after it is out of their hands the remedy is revived, 13 *Edw.* 4.5. *Str.* 2. & 3 *Edw.* 6. chap. 8. The Executor or Administrator of him which had a Rent or Fee-farm for life, in Fee-simple, or Fee-tail, may distrain the Tenant that should pay it. So may the husband after the death of his wife, for the Rent due out of her Land in her life time, so also may the Executor or Administrator of the husband after his

his death, and so also may he that hath Rent for another mans life, after the death of him for whose life he holds it, *Stat. 32. H. 8.*

Wherever a man hath power to distrain, he may do it by his servant or Bayliff as well as by himself, and to this purpose he may make any one his servant by word of mouth, *Co. 4. 8.*

Servant.

He that hath right to a Rent-Service, which is a Rent due by the Tenure of his Land, as of such a Mannor; by this Service, be it money, homage, escuage, fealty, suit of Court, relief, horse, rose, o, the like; may, if in be behinde, distrain for it of common right, *D. & Sr. f. 21.* So that a Free-holder of a Mannor, if he be by his tenure to pay any such Rent, or to do the Office of a Butler, Carver, Brewer, or the like, to the Lord; or to pale his Parks, or thatch his house, or the like, or to amend high-ways, Bridges, or the like work tending to the publike good, and he do it not, the Lord may distrain for it, *Noy 50. § 1. Cook of Copyholds; f. 49.* But for Frankalmoin incertain, or any other incertain Services, that cannot be reduced to a certainty, the Lord cannot distrain, *Cook upon Litt. f. 97. 96. 147.*

Rent-service.

Corporall Services.

The donor or Lessor upon a gift in tayl, lease for life, years, or at will, of Land rendring Rent, may distrain for it so long as he hath the Reversion of the Land in him, *D. & Sr. f. 21.* So in all cases where *ex previsions hominis* by their own agreement, there is a power of distresse given. A Rent given to one Copartner upon a partition of Land, to make an equality: For this he may distrain upon the rest of the Land of common right, *11 H. 4. 3.*

Rent-seck cannot be distrained for, as if one Lease for 20 years, and the Lessee Lease over for 10 years rendring Rent, and after grant away this Rent, this Rent cannot be distrained for, *Cook upon Litt. f. 53. 2. Ed. 4. f. 125. 126. 127. 128.*

Rent-seck,

The Lord of the Leet may distrain for a Fine, a Mercement, or penalty of a by-Law in a Leet of common right, *Dyer 322. Co. 1. 44. 21 H. 7. 40. D. H. 7. 15.* But no Lord whatsoever may distrain a man out of his Fee to enforce to come to his Court, him, upon whom he hath no Jurisdiction or Bayliwick, *Westm. 1. ch. 16. Westm. 2. ch. 36.*

Fine. Mercement, or penalty of a By-law in a Leet.

Amercement,
Attachment
in a Hundred-
Court or
Court-Baron.

The Lord of a Hundred Court, or Court Baron, may distrain for an Amercement in either of those Courts, if he can alledge a speciall Custome, or prescription for it. But otherwise not *FNB. 100. Coo. 159. Ney 51.* So likewise upon an Attachment out of either of these Courts, 33 *H. 6. 53.*

Amercement
on a Town-
ship.

If a Township be amerced for any cause by the common Law, and they make a Rate upon the Parish for it, it seems this may be distrained for it. But upon a By-law without question made by the major part according to custome, a distraining power may be given and used, *D. & St. F. 74.*

Ayd.

The Lord may distrain his Tenant for Aid for the marriage of his Daughter, *FNB. 82.*

For Issues.

Issues returned upon Jurors or otherwise in the Exchequer may be distrained for, 5 *H. 7. 1. FNB. 139.*

Publike Debts

The Common-wealths Debts may be distrained for, 16 *Ed. 4. 10.*

Fifteens.
Fees for
Knights of
Parliament.

Fifteens out of Parliament may be distrained for, 11 *H. 4. 2.*

Fees for Knights of the Parliament may be distrained for, 11 *H. 4. 2.*

But for Debt, Trespasse, Account, or revenge only where no distress is given by the Law, no man may distrain, *D. & St. f. 15. Star. 3 Ed. 1. ch. 23. Marib. ch. 1, 2, 3. 22. Westm. 1. ch. 28. Ed. 1. ch. 12.*

In respect of
the ownership
of the distress.
Sec. 4.

He that may distrain for a Rent issuing out of Land, may distrain any of the Goods or Cattle of the Tenant who is to pay the Rent as soon as ever they come upon the place out of which the Rent doth issue, but he cannot distrain them out of that place, nor can he bring the Goods thither of purpose to distrain them.

For Rent or
Service.
Levant and
Couchant.

And if another mans Goods or Cattell be, or come into or upon that ground casually or by escape, after they have been Levant and Couchant there some reasonable time, as if they be living Cattell, and have fed and lien down; in this case, and then, and not before, as some say, but others say before they be Levant and Couchant there also are distrainable for the Rent, 7 *H. 7. 1. 10 H. 7. 21. 11 H. 7. 11 H. 7. 4. Dyer 317. 15 H. 7. 15. D. & St. f. 15. 22 Ed. 4. 40. Coo. up. on Litt. f. 47.* And if a stranger purposely put in his Cattell there

there to do Trespasse, the party that hath cause may distrain them presently before they be Levant and Couchant, *D. & Sr. f. 15. Dyer 3. 17. 15 H. 7. 17. 1 H. 7. 1.* So also where the stranger is to pay the duty, *1 H. 7. 1.* And it seems unreasonable that where Cattell come in by the default of the owner, as if the moulds be his, and he let them lie open, that there they may be distrained as soon as they come into the place: Also it seems reasonable that my Cattell should not be taken in another mans ground for his duty, unlesse they come there by my consent or default, and that therefore if my Cattell come in there, by the fault of another mans inclosure, or the like, that they should not be distrainable for Rent. But it seems the Law is otherwise in this case, for if *A* have a Close adjoining to the Close of *B*, and *A* lease his Close to *C* for 60 years, and *C* lease it to *D* for 10 years rendring Rent which is behinde, *D* being to make the bounds between the Closes, doth suffer them to be decayed, whereby the Cattell of *B* came into the Close of *C*; in this case *C* may distrain them for his Rent, and *B* must be relieved against *D* by Action of the Case, or the like, *M. 17. Jac. B. R. Hob. Rep. pl. 345.*

If the cause of the taking of the distress be Damage-lesant, it matters not who is owner of it, nor by whom it is put into the place, for it is distrainable if it be there, *1 H. 7. 1. Bro. 40. 22 Ed. 4. 49.* Damage-lesant.

For issues any mans Cattell upon his ground, upon whom the issues are returned, may be distrained, *5 H. 7. 1. Bro. 40. 22 Ed. 4. 49.* Issues.

For a Fine or Amercement in a Leet, no mans goods can be taken but the parties himself who is sued, and not another mans upon his ground, as in the case of Rent, *F. N. B. 190. 47 Ed. 3. 13.* Fine, Amercement, &c.

Goods distrainable in their nature, yet may not be distrainable in respect of the place where they are for the present: See it afterwards.

For Rents and Services one may distrain almost any chattell-personall, as Cattell, household-stuff, and moveables, as beds, bedsteads, pewter, brasse, and the like. Also a Wayn and Oxen, and the Wayn loden though with Corn or Shocks and sheaves of Cord, otherwise not distrainable, *2 H. 4. 19.*

In respect of the quality & nature of the distress.

Sec. 5.

21. H.7.9. Dyer 281. 20. Ed.4.3. No. 52, 53. But it seems plow, cartell, and sheep, if there be other distresse sufficient, ought not to be distrained for any cause, because they serve for the Common-wealth, *Stat. de districtione Scaccarij*, 28. Ed. 1. lib. 122. Dyer 312. F.N.B. 174. And yet these being taken, it is a good distresse, but they that take it are to be punished, *fieri non debet sed factum valet*. The like Law is of Instruments of ones trade and profession, as Books of a Scholar, Smiths Anvill, Carpenters Axe, or the like. And yet if men have superfluous Tools, these may perhaps be distrained, F.N.B. 90. *For upon Litt. f. 47. 14 H.8.5.* But such things as are parcel of, or fixed to the free-hold, as trees standing, houses, the doors, windows of houses, Mill-stones, Wain-scoch, Furnace, and Fats fastned to the house, pales, stankes, gates, evidences, and the like, are not distrainable; And yet if doors, Mil-stones, &c. be parted and laid aside from the House or Mill, and so other things divided from the Free-hold, in this case they may be distrainable, 14 H.25. 21 H.7.26.

Such things as are priviledged for publike good, as a Mill-stone being out of the Mill, pecking. Such things as whereof the Sheriff cannot make a Replevin, and which he cannot deliver in the same plight, as dead victuall that will corrupt, sheaves and shocks of Corn that will waste, and the like, are not distrainable for Rent, *Co. first part of his Inst. f. 47.* So such things as cannot be distinguished from others of the same kinde, as money, Corn out of a heap, money at large, or sheaves of Corn, Tythe, or the like, are not distrainable. And yet a sack of Corn, a box or purse of money, or sheaves of Corn upon a Wayn may be distrainable, 9 H.6.9. 13. Ed.4.6. 11 H.7.15. *Kelw. 126. 7 H.7.1.22. Ed.4.47.* So such things as are for mens present necessity, as a Horse when a man is in his Journey, though he be in the place distrainable, are not distrainable. And if the Horse that comes with grist be tyed at the Mill, or one go into a house upon businesse, and tie his Horse at the door the whilest, this Horse cannot be distrained, *Bron 61. p. 139. Ellis. Co. B. Adjnd. Rendes Case.* So such things as are distrained already and in pound as a distresse, cannot be taken again whilest they continue so, *Bron 75. 22 Ed.4.11. 14 H.8.5.* So such things as

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are *ferè natura* or invaluable, as Conies, Doggs, and the like, *Coo. 1. 47.*

But for Damage fesant it seems any thing whatsoever that is upon the place doing hurt, is distrainable, 21 *H. 7. 39. 15 H. 7. 13. 22 Ed. 4. 47.*

If the distresse be taken for homage, fealty, or expences of Knights in Parliament, any distresse may be taken, and nothing shall be said to be excessive. But in other cases the distresse ought to be somewhat proportionable to the cause and duty for which it is taken, and ought not to be excessive, as to take a sheep for 2^d, or an Ox for 16^d, or the like, for these are unlawfull and may be punished. So if one distrain very often for one and the same thing, *Excessus in re qualibet in jure reprobatur, Coo. 4. 8. Broo. 89. 22. Ass. 51. 28. Ass. 50. Coo. 11. 44. ENB 174. 45 Ed. 3. 26. 20 Ed. 4. 3. 22 Ed. 4. 50.* And yet in case where the Distrainer cannot well take a thing of lesse value, and the thing taken be an entire thing that cannot be divided, it is not held unreasonable: and therefore if one distrain a Cart with a carriage of Corn, and the Oxen or Horses annexed to them for 10^s Rent, or an entire flock of Sheep for 2^s, this is not unreasonable, 41 *Ed. 3. 26. 20 Ed. 4. 43.* If one have distrained once, and in the suit the Seigniorie come in question, he cannot distrain again till this be decided, 7 *H. 4. 4.*

For Damage-fesant one may distrain by night or day; but for Rent or other things, one must distrain in the day, and cannot distrain in the night time, *Coo. 9. 66. upon Litt. 142. Nov. 51. 35 H. 6. 10.* One may not distrain for his Rent before, or upon the very day that it doth become due, 25 *H. 6. 4.* And therefore if the last Rent be to be paid at *Michaelmas*, the last day of the Term, that cannot be distrained for, therefore it is wisdom to make it payable at *Midsummer*, *Coo. upon Litt. f. 47.*

If a distresse escape out of Pound, the distrainer cannot distrain him again, unlesse he take him presently upon a fresh pursuit, *Coo. upon Litt. 142.* If one make a Lease rendring Rent at *Michaelmas*, provided that if it be behinde 20 dayes after that he shall distrain for it, in this case some have thought he cannot distrain till the 20 daies be past, but others the contrary, where

Damage-fesant.

In respect of the quantity or multiplicity of the distresse.

Sec. 6.

In respect of the time of the taking of the Distress.

Sec. 7.

In respect of the place of the taking of the Distress.

Sec. 8.

where the words are in the affirmative, and distresse is incident, and that there he may distrain at any time after the first day on which it is to be paid, *Coo. upon Litt.* 204.

It is a Rule, that for Rent no man but the Keepers of the Liberties, &c. may distrain out of his Fee (i) the House, Ground or Place out of which it doth issue, 9 H.6.9. and this is true, albeit it be the grantee of the Keepers of the Liberties who is to distrain: and yet by the agreement of the parties he may distrain in another place; and if a Rent be granted out of a Mannor, it cannot be distrained for upon of the Lands of the Tenants, who had their Estates before the Rent was created, 12. Aff. 40. And yet if a man be coming to distrain, and the owner or another perceiving it doth drive or carry away the things he is about to distrain into another place, in this case he may pursue them presently upon a fresh pursuit, and distrain them there. So if I distrain, and one rescue the Distress from me, I may (as it seems) upon a fresh pursuit, either take them again in any place, or have a Writ of Rescous against him, *Marl. ch. 2.* 15. 9 H.6. 9. 13 Ed. 4. 6. *Dyer* 44. 25. *Coo.* 9. 22. 33 H.6. 53. 11 H.7. 5. 21 H.7. 40. But if the Lord coming to distrain have no view of the Distress within his Fee, though the Tenant do drive them away purposely, or if after the view the things (being Cattle) of themselves go out of his Fee, or if the Tenant after the Lord hath the view of them for any other cause, and not to prevent the Distress, do remove them; in all these cases the Lord cannot justify the taking of them, *Coo. upon Litt.* 160, 161. If A Lease Land to B for 10 years rendering Rent, and after doth grant the Reversion to C for 20 years, and B doth attorn to C, and the Rent is behinde, and C license a stranger to put in his Cattle; yet he may distrain them, for the License was void. And yet if the Lessor drive the Cattle upon the Land of purpose that he may meet with a Distress, and then distrain upon them on the Land, this is not justifiable, *M. 18 Jac. B. R. Curia. St. Tho. Heydsdens Case.* Things in their nature valuable and distrainable, yet being in a place by authority of Law, for the maintenance of Trading, are privileged, and are not distrainable, as a Horse

in an Inne or common Hoftry, or at a Smiths shop shoeing, nor the materials of the Cloth in a Weavers shop, nor Cloth or Garments in a Taylors shop, nor sacks of Corn in a Mill, nor Corn or Cattell, or other things standing in a Fair or Market to be sold, so Yarn in a mans hand or on his back, who is a Tradesman in the way of his Trade, *Cook upon Lit. f. 471. Pasch. 3. Eliz. Coo. B. Adjudg. Reads Case.* And yet if a man be driving a Distress and it go from him, and escape into a Fair or Market, he may in a fresh pursuit take him thence in this case, *7 H. 7. 21. 21 Ed. 4. 36. 9 Ed. 4. 2. 22 Ed. 4. 36. 19 H. 7. 21.* And this it seems holds true in a Distress taken for any thing else, as well as for Rent.

If an Officer of a Court, Hundred or Baron, be coming to Attach Goods, and another perceiving it, doth drive them out of the Hundred; in this case the Officer having them in view, and upon a fresh suit, may pursue them out of the Hundred, and there take them, *33 H. 6. 33. 34 H. 6. 18.* But for a Fine or an Amercement in a Court, the Lord may Distrain any where within the Mannor, the Goods of the party fined and Amerced.

For Amercement, or on an Attachment out of a Court,

For Issues one may Distrain upon his Land, upon whom the Issues were put, though he afterwards sell it, and it be now another mans Land, *5 H. 7. Broo. 40.*

For Issues.

For Damage-felant a man may Distrain in no other place but the place where the Damage is done: and therefore if in this case the Owner in the view of him that is so Distrain, doth drive them away, he cannot pursue them and take them as he may in a Distress for Rent, *F. N. B. 90. Cook upon Lit. 161. Plow. 38. Cook 9. 22.*

Damage-felant.

A Distress cannot be taken in the high-way or common Street, *Marlb. ch. 15.* Nor may one Distrain in the ancient Fees or Lands of the Church, but in those that have been newly purchased he may, *Articuli cleri. chap. 9. 9 H. 6. 9.* Nor in a Sanctuary, *Cook 5. 92.*

High-way. Fee of the Sanctuary.

A Horse cannot be Distrained while the Owner thereof is riding upon, or leading of him, nor nor if he be tied at a Mill and came thither with Grift, nor while the Horse is tied at the door of a mans House, the Owner being gone into the

In any other respect. Sect. 9.

House on some businesse, *Plas. 39 Eliz. Coa. B. Adjudg.* Nor an Ax whiles he is in a mans hand cutting of wood, nor goods that are impounded and in the custody of Law, being Distrained already Damage-fesant, nor goods escaped out of the Pound, unlesse they be taken again presently, *Cook upon Litt. f. 47.* He that is so Distrain cannot justifie the breaking of Hedges or Gates to come to make his Distress, much lesse can he justifie the breaking open of a House, *Cook upon Litt. 162.* But the doors of a House being open, and the House being within the place of Distress, a man may justifie the going in there to make his Distress. And in all these cases where a man makes an unlawfull Distress, as out of time or place, or the like, the party grieved hath his remedy by Action of Trespasse, and in some cases by other Actions, which see in Trespasse and other Actions, and in most cases he shall have his remedy upon the Replevin.

Trespasse.

How a Distress must be used after it is taken.

Sect. 10.

The party that doth Distrain Cattell or other goods, must take care how he doth dispose and order them after he hath taken them, for he can neither sell them (except it be in some speciall cases) nor may he use them as his own, as if it be a Horse or Ox, he may not ride or work it, if it be a Cow he may not milk it, no albeit he have it upon a return irreprevisable, *M. 7. Jac. Lewis Case.* And albeit he take it by vertue of a clause in a Deed, that he shall Distrain and keep the Distress till he be satisfied, or if it be that he shall Distrain without gage or pledge, *M. 7. Id. Coa. B. per Foster.* But he must put the Distress altogether, if it be Cattell, in some one lawfull Pound (if one Pound would hold it) within the County and Hundred where the Distress is taken, or else within some Pound overt within three miles of the place where the Distress is taken. And yet if a Lord of a Mannor have Land in another County, belonging to his Mannor in this County, he may if he Distrain upon that Land, bring it to the Pound of his Mannor in this County, *1 H. 6. 3. 22 Ed. 4. 11.* And if the thing distrained be Utensels of a House or such like Goods, which may take harm by wet or weather, or may be stolen away, in this case it must be put in a House or other Pound covert within three miles of the

the same County. And if the thing Distrained be any live thing, and it be put in a Pound overt within the same County, where the Owner may lawfully and possibly come at it to give it meat without doing trespass to any man, he must look to them and give them meat at his perill; for if they die for want of food, the Owner must suffer the losse, and the party may Distrain again, and if the party distraining should give them meat, he cannot keep the Cattell till he be paid for the meat, nor sue to recover satisfaction for it, because he is not bound to do it, *Pasche & Jac. B.R. Bradshawes Case*. But if the party Distrained did, before it was done, promise to satisfie him, he may upon the promise recover it. But if the Distrainer put them in a Pound close, where the Owner cannot come to them, either because they are in a Castle or Fort, and so it is impossible, or because they are in another mans ground, and so is unlawfull: nor if they be in an open Pound, but he drive the Distresse out of the County. Or if the Keepers of the Liberties Writ come to deliver them, and he refuse to deliver them, or if the Distress were for Damages, and before the impounding the party Distrained had offered sufficient amends for the trespass and the party Distraining had refused, it befores the party Distraining to see they have meat, for if in these cases the Cattell perish for lack of meat, the party Distraining must bear the losse of them: and yet if in this case he give them meat, he hath no means to recover satisfaction for the meat. So also if the things Distrained be things without life, that will corrupt, or may be lost, and they be put into a Pound close, where the Owner cannot look to them, and are lost or perish for want of looking to, or are put in a Pound overt, and there spoiled by rain, &c. which by his looking to could not be prevented, in all these cases, where the party Distraining doth abuse his Authority, he is esteemed to be a Trespassor from the beginning, and the party Distrained and grieved shall have an Action of Trespasse against him for his relief, *Cop. 8. 146. 9. 146. D. & Sr. 112. 22 Ed. 4. 47. 30. Aff. 38. Marlb. chap. 1. 3. 3. 4. Dyer 281. Plow. 68. Broo. 53. Keln. 71. 9 Ed. 4. 2. Cook upon Litt. 4. 70. Westm. 116. 17. Noj 53. 21 Ed. 4. 53.*

Trespasse.

And if the party Distraining put the Distress in a Pound out of the County where the Sheriff cannot make a Replevin; in this case the party grieved is to have a Writ of *Withernam*, *West. 1. chap. 17.* And if he put the Distress into a strong Castle or Fort, that the Sheriff cannot repleve them, he may take the posse *Comitatus* and deinolish it; if he cannot otherwise have it done, for in these cases no Action of Trespas or other remedy is given, *West. 1. ch. 17.*

If a beast be unruly in the Pound, and is like to leap over the Pound, it seems the Distrainer cannot justify the binding him to the Pound, nor the fettering of him, *Brea. Trespas 250. 27. Aff. pl. 64.* And yet one took a wilde Colt as an Estray, and because he could not keep him in Pound otherwise, he did cross-fetter him, and the Owner brought an Action of Trespas for this, and the chief Baron directed the Jury to finde against the Plaintiff, and he held it lawfull in this case; not otherwise, *At Sarum. Assises 19. Jar.* If one Distrain beasts for the Commonwealth, he must put the Distress in Pound, and if the Owner give them meat himself, he shall not pay for the keeping of them, and they must not be sold within 15 dayes after the taking; And if the party shew an Acquittance or Tayl out of the Exchequer, or under the Sheriffs hands, and offer to put in Bail to answer it in the Exchequer upon the next Accompt day, the Officers distraining must deliver the beasts again, *Stat. 21 Ed. 1. 51 H. 3.*

Amercement
in a Leer.

But for a Fine or an Amercement in a Leer, the party Distraining may sell the Distress, and pay himself; and give the overplus to the Owner, *Cook 8.*

Rescous, what
it is.

Sec. 11.

This word is applied to persons and things: To persons, when a man is Arrested, and he himself or another doth release him: of this we speak not in this place, but of Rescous of things, and so it is a Writ lying where one or his servant doth Distrain for Rent, Service or Damage-fesant, or for any other cause, and being about to impound the Distress, another taketh it away from him, and will not suffer him to impound it; in this case the party hurt and grieved by this may have this Writ for his relief against the taker, and shall recover damages for it, *Terms 13, 279. F.N.B. 101, 102. Co. upon Lib. 100.*

If one Distrain Cattell, and in driving of them to the Pound they get into the Owners house, and he doth withhold them, and will not suffer the Distrainer to have them to Pound; this is a Rescous for which this Action lieth, *Cook super Lit.* 161, 315.

If one be coming to Distrain, and the Owner drive away the Cattell, and he that is about to Distrain doth follow them upon a fresh pursuit (as he may) and the party will not let him have them, but drive them away; in this case he may have this remedy, 44 *Ed.* 3. 20. But if before one be come in sight, the Owner drive out the Cattell, or they go out themselves so that he misseeth of that Distress, this Writ will not lie for this, *Cook upon Lit.* 160. If the Lord Distrain his very Tenant without cause and unjustly, and it be rescued, it seems this Action doth lie. And yet if any other but the Lord upon his Tenant distrain without cause, or out of time or place, in any of the cases before, this Action will not lie, *F.N.B.* 102. 40 *Ed.* 3. 32. *Cook upon Lit.* 160, 161. 44 *Ed.* 3. 20. 2 *H.* 4. 15. 22.

A Pound is a place of strength wherein Cattell or Goods Distrained are put for the time, untill they be replived, or redeemed. And this is either Overt, which is such a place as to which the Owner may possibly and lawfully come to give the Cattell distrained meat and drink. And this also is either publike and common, as the Pound of every Township, Lordship or Village is: or else private and particular, as any Court, Backside, Yard or Ground may be where the Cattell may be, and whither the Owner may come to give them meat and drink without doing trespassse to any man; or else it is Close, which is such a place as to which the Owner of the Distress may not either lawfully or possibly come to give his Cattell meat, as when they are in another mans Houle and Ground, or in a Court, or House invironed or closed with high walls. But some call the Pound overt the Pinfold made for that purpose, or his own Close, or the Close of another by his consent. And the Pound close to be when the place is some part of the Owners house, *New Terms of the Law*, 9 *Edw.* 4. 2. *Cook upon Lit.* f. 47. *Noy.* 52, 53, 55. *D. & Sr.* 112. *Dyer* 288, 21 *H.* 7. 39. *S.* H. 7. 9.

Pound what
it is.
How many
kinds there
are.

Sec. 12.

Recaption,
what it is.

This is a Writ lying where a man is Distrained for any service, and hanging that sute he is Distrained again for the same cause; in this case albeit it be for services due after the first Distress, yet he cannot Distrain again till the first Sute ended, and therefore the party grieved hath this remedy, *FNB. 71. Finchelsey 446.*

Where it doth
lie or not.
Sect 13.

If one Distrain two mens beast at first, and then Distrain one of them again, he may have this Writ. So if the Lord Distrain for Rent or Service, and after his Bailiff by his command Distrain again for the same cause, *FNB. 71.* But where the Distress is for Damage-fesant, upon a new Trespass, or the second Distress is not the goods of the same man, or the second Distress is by another, not by the same man, or where the second taking is by a Writ of second deliverance; in all these cases this Writ lieth not. Also where the Distress is not sufficient, he may distrain again and again, till he have sufficient Distress, and this Writ lieth not, *FNB. 71. Broo. 98.*

*Affise de soven
fons distresse.*
What it is.
Sect. 14.

This is a Writ lying where one hath cause to Distrain, and he doth it so often for the same cause that the Tenant is grieved thereby, and is not able to manure his Land, in this case the party grieved may have remedy by this Writ, and in the sute upon it he shall have Judgement to hold his Land free, *Abſque multiplici diſtictione.* But if the cause of taking be for homage, fealty, sute of Court, or other corporall services, this Writ doth not lie, *Coo. 4. 8. 11. 44.* And if the Lord distrain for more services then are due upon his Tenant, he shall be relieved by the Writ called, *Ne injuſte vexes.*

*Ne injuſte
vexes.*
Parco fracto,
What it is.
Sect. 15.

Parco fracto is a Writ lying where a Distress is taken out of Pound after it is duly impounded, either by the owner of the Distress, or some other: In this case the party grieved by it may have this remedy against him that did it, and shall have judgement to recover damages for it, and to distrain the Cattel again whereforever he shall finde them. For this also the party offending may be punished in a Leer, *FNB. 100. Cook upon Lit. 47. 20 H. 7. 1. 34 H. 6. 18.*

What shall be
said a Pound
breach, for
which this
Writ lieth,
or not.
Sect. 16.

This Writ lyeth whether the Distress be taken for Damage-fesant, or for Rent, or any other service, *Finchelsey 310.* So also it lieth whether the Distress be taken out of a common Pound,

or out of a private Pound, *Finchesley* 310. So also albeit the impounding be unlawfull, as when the party distrained for Damage-felant, after the taking and before impounding offer sufficient amends, and the party distraining doth refuse it, *Brook. 402. D. & St. 112.* So also if one that hath a Replevin, or other colourable authority (not good in Law) by vertue hereof get out the Cattel, *M. 2. Jac. B. R.* So if a man that hath a good Authority break the Pound before he demand the Cattel of the keeper of the Pound, and he do interrupt him in the taking of them; in all these cases the party grieved may have this Writ for his remedy, *Cook upon Lit. 47.*

Replevin is, where one doth Distrain another for Rent or any other cause; in this case the party Distrained, and thereby grieved, upon giving security to the Sheriff, or his Deputy, that he will pursue his Action, and return the beasts again (if the taking shall be adjudged lawfull) may have this Writ, whereby the Sheriff himself or (if it be within a Franchise where the Goods are impounded) the Bailiff of the Franchise by Warrant from the Sheriff, or if he do not, or will not, the Sheriff himself must restore the goods to the owner again, and this the Sheriff may do, either by vertue of this Writ called a *Replegiari facias*, which the party grieved must sue out for that purpose. Or the Sheriff may do it *ex Officio*, and without any Writ upon a sute before him in his County-Court. For Goods may be relieved two wayes (*viz.*) Either by Writ, and that is by the common Law, or by plaint in the Sheriffs Court, and that is by the Statute, for the more speedy having of the Goods; for by the Statute the Sheriff is to have four Deputies alwayes in the County to make *Replevins*. And hereupon it is that the Sheriff is to take two kinde of Pledges, one by the Common-Law, called, *Plegii de prosequendo*. Another by the Statute, and they are, *Plegii de Retorno habendo*. And if the Sheriff deliver the Distresse, and do not take Pledges to return them, if return shall be awarded, he must answer the price of the Distresse. In the same manner may a *Replevin* be made in any Hundred-Court, or Court-Baron, and in both at any time before the Court.

Replevin,
what it is.

— *Stat. 17.*

Replegiari facias.

Court-day, and this according to the Plea ministred by the parties, groweth either to be a reall or personall Plea. For if the Defendant (being the party distraining) by his Plea claim the property, then is it personall. But if he avow the taking for Rent or Services, then is it reall. And in case where the Defendant doth claim a property in the thing taken, this Question must be decided by a Writ, called, a *Proprietate probanda*, ere they can proceed any further. And if any thing touching the Free-hold come in question, As if the Defendant avow for Damage-fesant, and the Plaintiff justifie the taking by reason of a common of Pasture, they can no further proceed in the County, Hundred-Court or Court-Baron, *Terms of the Law, FNB. 68, 70. Cook upon Lit. 145. 161. 4 H. 6. 30. Marlb. chap. 21. chap. 2. Westm. 1. ch. 16, 17. 1. & 2. Ph. M. ch. 10.*

If divers mens Cattell be taken, they may not joyn and have one Replevin, but they must have severall Replevins, *Cook upon Lit. 145.*

For & against
whom, and in
what case it li-
eth or not.
Sect. 18.

Whosoever will have this remedy for Goods taken, must see that he be owner of the Goods distrained, at the time of the taking, for it is a Rule, The Plaintiff in this case must have a generall and absolute, or at least a speciall property in the Goods distrained at the time of the taking, or else his Replevin is not maintainable. And therefore it is held a good Plea in the Replevin to say, that the property of the thing was at the time of the taking of it in a stranger, *Cook upon Lit. 145. 27. H. 8. 21. 20 H. 6. 19. 6 H. 4. 2.*

If a man grant by his Deed a Rent with clause of Distress, and grant further that he shall keep the Goods distrained against gages and pledges (that is) that they shall not be replevied till the Rent be paid; in this case notwithstanding these Goods are repleviable by this means, *Cook upon Lit. 145. 31. Ed. 3. Gage deliverance 5.*

Return of the
Sheriff.

If in case where the Triall is by plaint in the County-Court, the party claim the property of the Goods, and in a *Proprietate probanda* for the Triall of this point it is found for the Plaintiff of whom the Distress was taken; in this case the Sheriff is to make a Replevin. And if it be found against

against him for the other that did Distrain, the Sheriff must return the claim of the property, upon the Writ of Replevin, that it may be tried above again, *Cook upon Lis.* 145. But in case where the Keepers of the Liberties are party, or the taking of the Distress is in their name and right, there no Replevin doth lie. And yet in this case *prima facie* the Sheriff may grant a Replevin. But when it shall be made appear to him, that the Keepers of the Liberties are a party, and the taking was in the right in them, the Sheriff must surcease, 3 *H.7.pl.1. Broo. Replevin* 33.

If when the Sheriff is coming to make a Replevin, by Writ or without, before or after *Gager de deliverance*, and the party that hath Distrained them claimeth some property in them, so that the Sheriff can go no further in the Replevin, till this point be decided; it must be by this Writ, and this must be had out of the Upper-bench or Common-pleas, if the sute were depending there, otherwise out of the Chancery, and it is directed to the Sheriff to try the property. And if upon this the Sheriff finde the property with the Plaintiff, he is to proceed in the Replevin: But if he finde it with the Defendant who Distrained, he must surcease: And yet this is but an Enquest of Office. And therefore albeit it be found against the Plaintiff, yet he may have a Replevin to the Sheriff, &c. And if he return the claim of the property, &c. yet he may bring it in question above in the Court there, where the property being put in issue, it shall be finally decided, *Cook upon Lis.* 145. 2 *H.7.6.* And if after a Replevin brought, the Plaintiff do make default, being non-sute before Declaration, or the like, or Judgement is given against him, then he that distrained the beasts may have a Writ called a *Retorno habendo*, and by this he shall have the Distress delivered to him again, *Dyer* 41. *Star.* 13. *Ed.1. chap.2.* And if he that distraineth, or the owner of the Cattell after the Distress taken doth esloin them, that is, carry them out of the County, or keep them in some Castle, so that the Sheriff cannot make a Replevin, or *Retorno habendo* (as the case is.) In this case the party grieved may have this Writ to the Sheriff, commanding

The manner
of proceeding
after Replevin:

*Proprietate
probanda.*
what it is.
Sect. 19.

Retorno habendo,
what it is.

Withernam,
what it is.
Sect. 20.

manding him to take so much of the Parties own Goods who hath done this, in stead of them. And if the Goods be put in a Castle, he may take *Poss Comitatus*, and break into the Castle, and make a Replevin, *FNB. 73. West. 1. chap. 17. Dyer 41. 59.* And if the plaint be in a Franchise, and the Sheriff make his Warrant to the Bailiff, and the Bailiff retorn that he cannot come at the beasts, the Sheriff may enquire of it at the next County-Court, and it being found, he may *ex Officio* grant a Precept in the nature of a Withernam to take so much of the Defendants Goods, or he may have this directed to him out of Chancery, *Daltons Office of Sheriffs, f. 167.* And if the plaint be removed out of the County-Court, or Court-Baron by a *Pone* or *Recordare* into the Common-bench, and after the Plaintiff in the Replevin is non-sute before any Avowry man; in this case this non-suit notwithstanding the party that Distraigned, may have again the same Distress by a Writ called *A second deliverance* (which is only to revive the first sute) And for this he cannot have a Recaption for a double Distress. And after this Writ had and Triall thereupon; or that the Plaintiff be again non-sute before Declaration, Retorn irreprevisable must be awarded to the Avowant. And then he may make his Avowry to the intent to ground a Writ to enquire of Damages, or he may hold the beasts as a Distress till he be satisfied. And if any *Retorno habendo* go forth before this Writ, this is a *Supersedeas* to it, and the Sheriff may not proceed upon it, *FNB. 72. Dyer 41, 42. 280. 59.* And if a Retorn be once awarded, and after another be retorn awarded, the Distress shall remain irreplegable, for there shall be no more Replevins.

If one have sued a Replevin, and have not the Goods delivered, and yet the other doth make his Avowry, in this case the Plaintiff may shew this in his pleading, that the Defendant is still possessed of the Goods, and pray that he may put in pledges for the deliverance, which is called *Gager de deliverance*: And this when they come to Issue or Demurrer, shall be granted to him, and then a Writ shall go to the Sheriff to deliver them. If one make a Lease to another for years rendring Rent,

Second deliverance what it is.

Sect. 21.
Retorn irreprevisable, what it is.

Retorno habendo.
Supersedeas.

Gager de deliverance, what it is, and where it lieth, or not.
Sect. 22.

Rent, with clause of Distress, and that he shall keep it till gree be made with him against gages and pledges, yet in this case he shall gage deliverance, *Cook upon Lit.* 282. But where the Avowant doth claim a property in the Goods, or the Distress be taken in the right of the Common-wealth, no gager of deliverance shall be upon the Replevin, 13 H. 4. 13. 2 Jac. B. R. *Stantons Case*.

An Avowry is where one doth Distrain another for Rent or other Cause, and the party distrained sueth a Replevin against the taker, and he in his Plea doth justifie and avow the taking of them to be lawfull, and shew why he took them, whether in his own right, or as servant and Bayliff to another. And this is called an Avowry, and he that makes it the Avowant, *Cook* 9. 135. And this is in the nature of a Declaration, And therefore it must contain sufficient matter, upon which he may have judgement to have a Return. If therefore it want substance it will not be good. Nor will the Plaintiffs pleading help it. But if it want form, or omit some circumstance of time, place, &c. in these cases this may be supplied by the pleading of the other party, *Cook* 2. 25.

There are four manner of Avowries for Rents and Services, viz. 1. *Super verum tenementum*, as in the case of Lord and Tenant. 2. *Super verum tenementum in forma predicta*, as where there is a Lease for life or gift in Tayl, the remainder in Fee. 3. Upon one as upon his Tenant by the Mannor omitting (very) As when the Lord hath a particular estate in the Seignior. And so shall the Donor upon the Donee, Lessor upon the Lessee. 4. Upon the matter in the Land, as within his Fee and Seignior. As where the Tenant by Knights-service maketh a Lease for life, reserving a Rent, and die, his heir within age, the Guardian shall avow upon the Lessee, (*Scil.*) *Super materiam predictam in terris & tenementis predictis ut infra feudum & dominium suum*, *Cook* 9. 135.

At this day by the Statute of 21 H. 7. chap. 19. the Lord may avow for taking a Distress, as within the Lands held of him, and within his Fee and Seignior, without naming any person certain to be the Tenant. But in this case the Plaintiff in the Replevin or second deliverance, shall have

Avowry, what it is.

Sec. 23.

In nature of a Count.

The kinds of it.

Upon what Avowry shall be made or not, and how.

Sec. 24.

every answer that is good, saving disclaimer. But the Lord may still avow upon the person if he will, at his election. And for a Rent-charge the party may by the common Law avow, and not avow upon a person certain. *Cook upon Lit.* 268. 3. 12.

If two parceners make a partition, and give notice thereof to the Lord, he must avow upon them severally, and not upon one of them for the whole Rent, *Brook chap.* 108. If the Tenant alien his Lands to another, and give the Lord notice of it, and tender him all the arrerages behinde, the Lord cannot after this avow upon him for any services. But till he hath given notice of it, he may avow upon him for new services, and after notice he may avow upon him for all the arrerages behinde, till the notice was given. But if the Lord grant away his reversion after the alienation of the Tenant, or the Lord accept the Rent or Service of the Feoffee, he hath no remedy for the arrerages. Or the Lord may (if he will) lose his arrerages, and avow upon the Feoffee. But if a Feoffer die, and the Lord do after accept the Rent or Service of the Feoffee due in his time, yet in this case he shall not lose his arrerages, because he is now compelled to avow upon him, *Cook* 3. 23. *super Lit.* 268. If the Tenant be disseised, and the Lord avow upon the disseisor, the Avowry shall abate, and the disseisor shall compell him to vow upon the disseisee. And yet it will be otherwise if he have accepted the services of the disseisor, *Cook upon Lit.* 268.

If a Replevin be against two, and the one of them doth avow for damage-fesant in his severall, and the other doth avow for damage-fesant as Commoner, in this case both the Avowries shall abate, and the Plaintiff shall recover his damages, *Co.* 5. 19. *Plow.* 10. 3. *H.* 6. 44.

Where the Lord hath gotten feisin of more Rent then is due, this will binde, and (being alledged in the Avowry) barre the Tenant in all cases but in these following cases, *viz.* 1. Issue in tayl will avoid the feisin had by the hands of the Tenant in tayl, *Cook* 4. 11. 9. 34. 2. The successor of a Bishop will avoid a feisin had by the hands of his predecessor, *Cook* 4. 11. 9. 34. 3. The very Tenant will avoid it where he hath a Deed to shew to the contrary, *Cook* 9. 34. 8. 65. 4. The incroachment of feisin

Where feisin
of more Rent
will binde in
an Avowry
or not.

See 25.

is

is not materiall where there is no Tenure. *Cook* 9.34.8.65.
5. The seisin will be avoided by coherſion of Diſtreſs, *Cook* 9.
34. *Cook* 4.11. 6. If the Rent be payable at one day in the year,
and the Lord encroach at two dayes in the year, *Cook* 9.34.

CHAP. XXXVI.

Of an Action of Debt.

THis word Debt is ſometimes taken for a ſum of money, What it is.
or other thing which is owing or due from one man to Sect. 1.
another, whether by writing or otherwiſe: And ſometimes it
is taken for the mean it ſelf to recover this thing, and then it is
ſaid to be an Action given, or a Writ lying where any ſum of
money or other thing is due to a man, upon, or by reaſon of a
Judgement or Recovery in Law, Obligation, or other Eſpecial-
ty, Account, Loan or Contract to be paid at a certain day, at
which day he payeth it not, then he to whom it is due ſhall
have this Writ to recover it, *New terms of the Law, FNB. 119.*
5 *Ed.* 4.1. In this place it is taken ſometimes in the one, and
ſometimes in the other ſignification.

The Action of Debt (wherever it lyeth) is ſometimes
grounded on matter of record, as either on an Act of Parlia-
ment, or a Judgement, Statute, or Recogniſance, or the like.
And ſometimes it is grounded on matter in fait: And that
either in writing, as an Obligation, Bill, Covenant, or other
Eſpecialty; or elſe without writing, as an Arbitrement, Eſ-
cape, Receipt, Paroll-contract, or the like. This Action may
be had and brought in any of the common Law-Courts, as
the Upper-bench, or Common-pleas, or other Courts that
have Jurisdiction. But if the Debt be under 40^s, the proper
Places to ſue for it is in the County, or Hundred-Court, or a
Court-Baron. And if the Debt be under 40^s, and owing by
one that doth live within the City of London, or the liber-
ties thereof, unto ſuch a one alſo, and be not grounded on
a reall contract, the party is bound by a ſpeciall Law to ſue
for it in the Court of Requeſts for the City of London, for

if he sue for such a petty debt in any other Court, he shall pay the Defendant Costs, and yet shall recover do costs in his lue against the Defendant, *FNB. 119. 3 Inc. chap. 15.*

No Action of Debt or Trespass, or other personall Action may be brought in the Common-Pleas, where the debt or damages doth not amount to 40^s or upwards, *Glonc. chap. 18. N.B. 61.* But by joyning two debts together for divers contracts together in one Writ, the force of this Statute is avoided, See *Crompt. Inr. 101.*

By whom this
Action may
and must be
brought, and
who may
bring it, and
who not.

Sec. 2.

Executor,

The party himself to whom the Debt is originally due, whilst he doth live, must bring the Action for it in his own name, and after his death his Executors or Administrators may, and must have the Action where there is cause. And if the Executor be under age, the Administrator *durante minori aetate*. And if there be divers Executors who have taken upon them the Executorship, after the death of some or one of them, the survivor or survivors must have the Action: And when they are all dead, the Executor of the last survivor: And so when there is but one Executor, and he doth accept and die, the Executor of the Executor, and so *in infinitum*, shall have the Action. And if an Executor die intestate, there must be an Administrator made *de bonis non administratis* of the first Testator, and he must have the Action; But the Ordinary or Administrator of the Goods of an Executor, may not have this Action for a Debt due to the first Testator, unless he have an Administration *de bonis non administratis* of the Testator, which is usuall, *Dyer 24. 20 Ed. 4. 20. Cook 3. 9. Dyer 471.*

Heir.

An Heir may not nor must have this Action for a Debt due to his Ancestor, may not asbeir it be due upon an Especialty made to him and his heirs, but the Executors must have the Debt and sue the Action, *FNB. 120.*

The Executors or Administrators, not the successors of a Bishop, Parson, Vicar, Master of Hospital, or the like, must bring this Action for the Debt due to the predecessor. But if a Debt be due to a Corporation aggregate, as Mayor and Commonalty, Dean and Chapter, or the like, in their politique capacity, there the Successor not the Executor must sue for it.

If

If there be divers Executors, and one of them sell some of the Goods (as he may if he will) in this case he alone may sue in his own Name for this. If one grant to me a Rent in Fee, and if it be arrear, to forfeit 40^s to me and my heirs, *nomine penae*, and I die; my Heir, not my Executor must have the Action for the penalty past, *Cook* 4.65. *Old N.B.* 62.34 *Ed.* 2.9. *FNB* 120.

Executor.

Heir.

This Action may and must be brought against the party himself that doth originally owe the Debt, whilst he is living: And after his death it may and must be brought against his Executor if he make any, and the Executor made do take on him the Executorship; otherwise against the Administrator appointed by the Ordinary, or if he appoint none, against the Ordinary himself: And if the Ordinary die possessed of the Goods, against the Executor of the Ordinary. And if the Executor die after he hath accepted the administration, then the Action must be brought against the Executor of the Executor; and so *in infinitum* if any such Executor be made. But if none such be made, then against the Administrator *de bonis non administratis*. And if the Administrator of the first intestate die intestate, also it may be brought against the Administrator of that Administrator, being Administrator *de bonis non administratis*. But it doth not lie against the Executor of an Administrator the debt of the intestate, *FNB*. 120. *Djer* 271. 160. 174. 112. *Cook* 5.9. *Westm.* 2. cap. 19.

Against whom it may or must be brought or not.

Sec 3. Executor.

It lyeth and may be had against an Heir upon an Especialty made by his Ancestor; if thereby he hath bound himself and his heirs, otherwise not.

Heir.

It lyeth and must be brought against the Husband and Wife for the Debt of the Wife, during the coverture.

Husband and Wife.

It lyeth and may be had in some cases upon a contract against an Infant: For which see *Contract*.

If one grant me a Rent-charge out of his Land, and the Rent is behinde, and after the grantor make a Feoffment of his Land to another, and then the Rent is behinde again, and then the Feoffee makes a Feoffment of it to another, or makes a gift in tayl, Lease for life, or years, or at will, or makes a gift in tayl with the Remainder over in Fee, and then

then

Heir.

then more Rent is behinde. In these cases if I or my Executor sue for this Rent, I must bring my Action against every one of them for the Rent due in the time of his occupation of the Land only. So if the Land charged descend to the Heir of the grantor, and from him to his Heir; in this case every Heir shall be charged for the Rent due to his time, *Qui sentit commodum sentire debet & onus*, Cook 7.34. Stat. 32 H.8.37. Cook 4.50. If I make a Lease for years to A and B rendring Rent, and A assign his part of the term to C, and B die; in this case I may have an Action of Debt against C, and the Executors of B, and I am not bound to have severall Actions, *Curia Cook B.M.4 Jac. Bayly & Burgess de Ipswicks Case*. An Action of Debt lyeth not against the Heir of a Conusor upon a Statute, nor against the Terre-Tenant, as it doth against the Conusor himself, Cook 3.15.

Heir.

Executors.

It lyeth not against the Executors or Administrators of a Lessee for years, for a Rent reserved on the Lease, where the Lessee in his life time, or his Executors or Administrators after his death, have assigned over their whole term, Cook 3.23.

If a Purveyor, Taker or Clark of the King, had contracted with me for any thing for the Kings house, in this case if he had been paid and allowed it from the King, I may sue him, otherwise I must have sued to the King for it, *Broo. Det. 62*.

Where it shall
be laid in the
Debet, and
where in the
Detinet.

Sec. 4.
Debet & De-
tinet.

Where this Action is brought for Money due to a man in his own right, there he shall bring his Action in the *Debet*, i. the Writ shall run in this form; it shall have both these words *Debet & Detinet* contained in it. But where the Action is brought for Rent, Corn, Cattell or Hens, or the like, reserved on a Lease for years, or the Action is brought by or against Executors, there it shall be in the *Detinet* only, i. it shall have this word only, and not *Debet* in the Writ. See for these matters 50 Ed. 3. 16. 11 H. 7. 5. 10 H. 7. 5. 19 H. 8. 8. Cook 5. 1.

Where it may
be had for par-
cell of a Debt,
and where not.

Sec. 5.

If one binde himself to me in a single Obligation, or by a verball Contract, to pay me money at severall dayes, as quarterly or otherwise; or I make a Lease of personall things, rendring Rent at severall dayes; in these cases I may not bring this Action for any part of this Debt, untill all the dayes be incurred, and then I may bring it for all together:

And

And therefore if one binde himself so by bill to pay me 20^l a year during my life, in this case no Action may be brought for this untill I am dead, and then my Executors may recover it all. So if I sell another a Horse to pay me five pounds a year, untill a 100^l be paid, this Action will not be untill all the money be due (but it seems) I may have an Action of the Case upon every failer. But if one be bound to pay me money after this manner, by Recognizance, the Condition of an Obligation, a Covenant, or the reservation of Rent upon a Lease made of a reall thing; in all these cases I may have this Action upon every failer of payment, *F N B* 130. 267. *Coo* 4. 94. & *super Litt.* 47. 292. *Dyer* 313.

Action of the Case.

If an Act of Parliament give a penalty or forfeiture to any person, and this Action to recover it, there this Writ lieth, and the party may have it accordingly. As a Parson may have this Action upon the Statute of 2 *Ed.* 6. against a Parochian for not setting out of his Tythes. So any man that is grieved by the false return of a Sheriff for a Knight of the Parliament, may have this Action and shall recover 100^l upon the Statute of 8 *H.* 6. *cap.* 7. 1 *H.* 5. *cap.* 1. But where the Statute doth limit a time within which this Action must be brought, the Action cannot be had after that time, *Plow.* 78. 200. 113. 15 *Ed.* 4. 19. *Broo.* *Det.* 103.

Where and in What case this Action or Writ lieth and is maintainable, and in what manner, and where not. *Sec.* 6. Upon an Act of Parliament.

If I have a Judgement in any Court to recover any debt, damages or costs in any Action, reall or personall, against another man; before execution be done, or the money paid, I may have this Action of debt for the things so recovered, or so much of it as is unpaid and not levied by Execution, and recover it by that means, and refuse to proceed or take my remedy upon the Judgement. But then these three things must be in the case, *Coo.* 5. 31. *Dyer* 21. 5 *H.* 7. 21. *F N B* 122. 1 It must be a year after the Judgement be had, ere the Action be brought, 5 *Ed.* 4. 1. 20 *H.* 6. 11. 2 The Judgement must be of a thing certain, for if the demand be of a thing uncertain, as if one have a Judgement in an Action of Trespass, or any such like Action, before the damages be certain, no Action of debt will lie for them, *Comper vers. Longworth.* *Hill.* 40. *Eliz.* *B. R.* 3 The Judgement must

Upon a Judgement or other Record.

Ff

continue

continue in force, for after it is actually reversed, no Action will lie upon it: but untill then, albeit there be manifest error in it, I may have this Action well enough. But if a woman the wife of a Copyholder, recover her Dower by custom of a Mannor in the Lords Court of the Mannor, and recover damages also, she may not have this Action of debt to recover these damages, *Co. 4. inter le Copyhold Cases, f. 30. 6.*

If a man enter into a *Statute Merchant*, or *Statute Staple*, or Recognizance to me, after it is certified by *Mittimus*, I may have a Writ of debt upon it, and recover the debt by this means, and refuse to proceed upon the Statute or Recognizance by any other means; or I may sue execution upon the Statute at my pleasure: But if I once sue Execution upon the Record, I cannot after have this Action of debt, *Co. 3. 15. Dyer 219. F N B 222. Dyer 300. p. 34.*

If I recover an Annuity in Fee against another, and after sue a *Scire facias* upon this Judgement, and thereupon have Judgement to recover it with damages; in this case I may have this Action of debt to recover these arrearages and damages, and wave my proceeding upon the Judgement, *F N B 122. Lit. Broo. Sect. 25.*

If in account before Auditors the Bailiff be found indebted to his Lord, the Lord may have this Action against him for this debt, and wave his proceedings in the Account, and then it seems the Bailiff must not be committed to Prison, *Dyer. 21. 21. H. 6. 8.*

If the Kings by their Patent had granted to me a summe of money out of the Custome of *London*, yearly for life or years, and hereupon I have a Writ of *Liberate* to the Customer to pay it, and this be delivered to him, and he have Assets at that time in his hands: if he refuse to pay it me, I may have this Action to recover it: So if I had had a Taile out of the Exchequer to the Kings Collector, to receive a debt due to me from the King, and I shew it to him, and he hath Assets at that time in his hands, and yet doth not pay me, I may have this Action to recover it, *F N B 121. 27 H. 6. 9. Broo. Taile de Exchequer 3.*

If one do by Obligation, Bill, Covenant, or other Writing, undertake

undertake or binde himself to pay me money or deliver me Corn or the like by a day, and do not perform it accordingly, I may have this Action against him, his Heirs or Executors, as the case is. And if it be by Covenant, I may at my choice have this Action, or an Action of Covenant to recover the thing, *FNB* 120. *New Book of Entries* 191. *Plow.* 439. *Curia Hil.* 7. *7a. Co. B.*

Upon a Contract by specialty, either in writing or otherwise.

If one grant a Rent to me and my Heirs in Fee, and grant moreover that if it be unpaid a certain time, that he will forfeit, and pay to me and my Heirs 40^s *Nomine pene*; in this case if he fail to pay the Rent at the day, I, or my Heirs after my death, may have this Action to recover this penalty, *FNB* 120. *Dyer* 24. *Broo. Det.* 60.

For a penalty

If a man by his Deed binde himself to do and perform divers things by severall Covenants, and by the same Deed binds himself in twenty Pounds *Nomine pene* to perform the same Covenants; in this case if he break any one of them, I may have this Action for the 20^s 22^d *H. 6.* 5.

If one borrow my Horse untill such a day, and do promise me to restore him that day, or else pay me ten Pounds for him; in this case if he do not restore the Horse, I may have this Action for the 10^s *FNB* 121. But if *A* Covenant that his Executor shall within a year or such a time after his death, pay 10^s to *B*; in this case no Action of debt will lie against the Executor, because it did not lie against *A* himself, but an Action of Covenant will lie. So if the Covenant be conditional, as that if *E* do not pay to *B* 10^s *A* will pay it: So if it be in the disjunctive to do such an Act, or pay 10^s if it be not done, an Action of Covenant lieth, not of debt: but if both be to be done by the Covenantor (*viz.*) 10^s if not 5^s such a day, *Contrā. See Penots Case. Cos. Pasch.* 33. *Eliz. Anstines Case. C. B.*

Executor.

Covenant.

If I being seized in Fee Simple, Fee Tayle, or for life, of Land, or of any incorporeall inheritance, as Common Advowson, Fairs, Markets, or the like, make a Lease for years of this to another, rendering Rent, and the Rent be unpaid at the time of payment; in this case I during my life, and my Executors or Administrators after my death, may have this

For Rent.

Executor.

Heir,

Action for these Arrearages against the Lessee, or if he be dead, against his Executors or Administrators; and so also may my Heir or Executor as the case is after my death, have this Action for the Rent to come. And albeit the Lease be on condition to re-enter for non payment of Rent, and I do re-enter by force of the same condition, yet I may have this Action for the Arrearages due before, and albeit the Lessee surrender his Estate to me, and I do accept it, yet I may have this Action for the Arrearages due before the surrender, and albeit the Lessee for years assign over his Estate to a stranger; yet I that am the Lessor may have this Action for the Rent to come against the Lessee whiles he doth live, or the Assignee, at my choice: but if after the Assignment I grant away the reversion, or die, or the Lessee die; in all these cases neither I nor the Grantee of this reversion shall have this Action: and yet if in this case the Assignment had been but of part of the Land, or of all the Land, but for a part of the time onely; here the Grantee of the reversion may have this Action for the Rent past or to come against the first Lessee, and after his death against his Executors or Administrators: And if I grant the reversion to a stranger, and the Lessee or Tenant attorn, the Grantee of the reversion shall have this Action for the Rent that shall grow due after the grant, *Coo. 10. 127. 20 Ed. 4. 9. Coo. Super Litt. 47. FNB 120. Coo. 3. 23. 65. FNB 121. 5 H. 6. 32.*

And if I be possessed of a term of years onely, and make a Lease for all or part of my time to another rendring Rent, I may bring an Action of debt for this rent upon this Contract. So also if I make a Lease to another of my Land, to hold at will onely rendring Rent; I may have this Action for the Rent; and in all these cases it is not materiall whether the Lease be in writing or no, unless it be in case of the demise of incorporeall things, as Commons, Advowsons, or the like, which will not pass without Deed, *Litt. Sect. 72.*

But if I have a Rent-Service, Rent-Charge, or Rent-Seck in Fee Simple, Fee Tayle, or for life, as if one make a Feoffment in Fee, gift in Tayle, or Lease for mine own or anothers life to me, rendring Rent; or one grant a Rent in Fee Simple, Fee Tayle,

Tayle, or for life to me; in all these cases, so long as this Rent doth continue, and I have any other remedy for it, I may not have this Action to recover the Arrearages by the Common Law, unless it be in some speciall cases: but if the Estate on which the Rent depended, or if the Rent it self be ended, or the Land out of which it doth issue be come into another hand, so that all remedy doth now fail, in these cases this Action will lie, *See for this divers Examples afterwards, and the Statute of 32 H.8. cap.37.* which is, that the Executor or Administrator of him that hath Rent or Fee Farm, in Fee, in Tayle, or for life; shall have this Action for this Rent against him that ought to pay it: so that now if one make a Lease for life rendring Rent, and the Rent is Arrear, and the Lessordie, the Executors may have this Action during the life of the Tenant for life, *Dyer 13. p.60. Litt.203. Coe.super Litt.47. Coe.4 50.7.20. Coe.7.78,79.* So if a Rent be granted to a man for his life *Habendum* after the death of his wife, and he enter into a Statute to me, who after have an Extent and the Rent delivered to me by a *Liberate*; in this case I may not have this Action for the Rent against the *terre-Tenant*, so long as the Extent doth continue, but afterwards I may.

So if there be Lord and Tenant, and the Lord demise his Mannor or Seigniorie to me for years, and the Rent of the Tenants is behinde; I that am the Lessee of the Seigniorie cannot have this Action for the Rent during the Lease, but afterwards I may. So if Lessee for life be of a Mannor; and the Rents be Arrear, and the Tenant surrender his Estate, he shall have an Action of debt for the Arrearages: So if the Tenant die, his Executors or Administrators shall have this Action, *9 H.7.17. Coe.7.79. F N B. 121.*

If a Feme be endowed of a Rent, or a Rent be granted for life, and the Tenant attorn to this grant, and after the Rent is Arrear, and then the Tenant in dower die, or Grantee die, or surrender his Estate, in these cases the Executors of the Tenant in dower or Grantee for life may have this Action for the Arrearages incurred before the death or surrender, *Coe.4.49. 9 H.7.17. 34 H.6.20.* If one have an Annuity or a

Rent-charge for years, and it be behinde during the Lease, and after it is ended, he may have this Action for it during the Lease, and after it is ended *per* three Justices, *Pasch. 10. Cur. at Serjants Inne.*

If a Parson or Prebend, &c. have an Annuity, and the Annuity is behinde, and the Parson or Prebend resign or die, in the first case he himself, and in the last case his Executors or Administrators shall have this Action for the Arrearages before. But as long as this Annuity, and the thing to which it belong, did continue, this Action will not lie for it, *Coo. 4. 48. 49. F N B 120, 121.*

If the sonne be Lord, and the father Tenant by a certain Rent, and the Rent is Arrear, and the Tenant die, and the Tenancy descend to the sonne, so that the Rent is Extinct, yet it seems the son may have this Action for the Arrearages by the Statute, *Coo. 4. 49. Quare.*

If my father grant a Rent-charge out of his Land to me his sonne in Fee, and the Rent is Arrear, and my father dieth, and the Land doth descend to me (whereby the Rent is Extinct) in this case if my father did not make his election in his life time by Distress and avowry for this Rent, I may have this Action of debt for the Arrearages incurred in his life time against the Executors of my father, *Coo. 4. 49. 45. Ed. 3. tit. Executors 71.*

If one grant a Rent-charge to me out of his Land for his life, provided that it shall not charge his person, and then he die, so that this Land cannot now be charged because the Estate is ended; in this case I may have this Action against the Executors or Administrators of this Grantor, notwithstanding the condition, *Dyer 227. Coo. Super. Litem 46. 39.* If the Husband be seized of any Estate in any Rent or Farm in the right of his Wife, and he die, his Executors may have this Action for the Rent by the Statute of 32 H. 8. cap. 37.

If a woman have a Rent for her life, and it is unpaid whiles she is sole, and after she is married, and then it is Arrear again; in this case the husband may have this Action for all these Arrearages before and after marriage, after the death of his wife, *Coo. 4. 51. F N B 120.*

If I make a Lease to a Feme covert for life, rendring Rent, and the Rent is Arrear, and she die; in this case I may have this Action against the husband for the Rent during the coverture, and after his death against his Executors. So if a man grant a Rent charge to me for life out of his Land, and the Rent is Arrear, and the Grantor make a Feoffment of this Land to another, and after the Feoffee make a Feoffment of it to another, and there is Rent behinde again in both their times, and then I die; in this case I in my life time, and after my death my Executor may have this Action for these Arrears: but we must sue every one severally for the Rent due in his time, *F.N.B. 121. 26 Ed. 3. 64. Co. 7. 39. Co. 4. 30. 11 H. 4. fol. ultimo, Vide supra.* But if Tenant in Tayle make a Feoffment in Fee, and the Discontinuee charge the Land with a Rent in Fee, and after infeof the issue in Tayle within age, so that he is remitted; in this case no Action lieth against the issue for his Rent; so in all cases where he that comes to the Land, comes not to it by, but above him that granted the Rent, *Co. 4. 30.*

If a Partition be made between me and another, and he promise or grant to me a certain summe of money yearly to make the Partition equall; in this case I may have this Action yearly to recover it, *F.N.B. 122.*

But if I have a Rent service or Rent charge in Fee or for life, and the Rent is Arrear, and after I grant over the Rent to another, and the Tenant attorn, and then I die, in this case my Executors shall not recover this Rent by the Statute of 32 H. 8. *Co. 4. 30.*

If a man seised of Land *jure uxoris*, make a Lease for years rendring Rent, and the wife die, and had never any issue by the husband, and the Lessee take the profits of the Land after the death of the wife; in this case so long as he take the profits it seems the husband may have this Action and recover the Rent, 9 H. 6. 43.

If there be Reckonings and Accounts between another and me, or another hath received my money to Account, and upon the casting of our Accounts it doth appear he is indebted to me 10^l, I may have this Action for this debt. If

Upon Accounts.

in

in the Account before Auditors it appear the Lord is indebted to the Bailiff, the Bailiff may have this Action to recover it against his Lord, *FNB. 121. Dyer 21.*

Upon a Loan.

If I lend another money to be paid me again upon demand, or upon a day certain, and he do not pay me; I may have this Action for the money, but I may not sue for it before the day, *Co. super Lit. 209.* If I lend another money, and after he mortgage Land to me for the security of it, upon condition to have the Land again upon the repayment of the money, and at the day of payment he doth tender me the money, and I refuse it, and thereupon he doth re-enter upon his Land (as he may) in this case notwithstanding this refusal, I may recover the money and have this Action for it upon the Loan. But if the mortgage had been without any such Loan preceding for the payment of money, as a gratuity, there by this refusal I am become remediless for this money, *Co. super Litt. 209.*

Upon other Contracts.

If a man come into my house who am an Inholder or Taverner, and there call for meat or drink for himself or his horse; in this case I may have this Action for the money, *Co. 8. 147.* But if *I.S.* owe me money, and another comes to me and intreat me to take him Debtor for this money, and promise to pay me at *Michaelmas*, I cannot have this Action upon this contract, *9 H. 5. 14. 44. Ed. 3. 21.* If a man promise me twenty pounds to marry his daughter, and I do marry her, I may have this Action for this Debt, *FNB 120.*

If I buy twenty quarters of Corn of another, or make a Lease of years rendring unto me a quarter of wheat weekly; in these and such like cases I may have this Action for the Debt. And in divers other cases where a contract that is Executory is good, and there is a good consideration for it, this Action will lie upon it, *FNB 119. Dyer 22. 9 H. 7. 5. See for this more in Contract and Assumpsit.*

Upon a Retainer.

If another retain me to do any lawfull work or service for him, and I do it accordingly, and he refuse to pay me for it, I may recover it by this Action; and if we do agree for a summe in certain, or the Law doth set down the certain wages for that work; as for a Serjeant his Fee for pleading; or an Attorney his Fee for prosecuting of a cause, or the like; in

in such cases I must bring the Action for that certain sum; But in other cases where our agreement is not so certain, as where I put my cloth to a Tailor to make a garment, or the like; in these cases I must bring my Action generally, and I shall recover as much as a Jury will give me, *FNB 120. Old NB 62. FNB 121. Co. 7. 10. 8. 147. 12 Ed. 4. 9.* A Barreter cannot have this Action or any other for his Fees, for giving of Counsel as a Serjant or Attorney may, and therefore he is not bound to give advice before he have his Fees: So was the opinion of *Mr Justice Bridgman, Et Curia in le Maxoes de Wales 7 Car.* Also in *Trin. 8. Car. B. R.* That a Solicitor cannot have an Action for moneys laid out upon any suit without an expresse Retainer to lay out moneys for him in such a suit, and an expresse promise to pay such sums.

If a Sheriff, Goaler, or other Officer that hath a man in Execution at my sute for Debt or Damages, do after suffer him willfully or negligently to escape, and do not take him again before I commence my Action; in this case I may have this Action against him that did suffer this Escape, and thereby shall recover as much of him as the Debt or Damages was: So if the suit were for Trespasse, or for Debt upon a Deed, and the party deny his Deed, so that he is fined and afterwards taken by a *Capias pro fine* within the year at the suit of the Keepers of the Liberty; if the parties that have taken him suffer him to escape, I may have this Action. But if the Arrest be on a mean Proccesse, as *Latitat*, *Capias*, or the like; there this Action will not lie for the debt of the sute whereupon the Proccesse came, but an Action of the case will lie; and if it be after Execution, yet it doth not lie for this escape against the Executors or Administrators of him that suffered it, *Plow. 35. Co. 3. 52. Dyer 278. FNB 121. Dyer 27. 21 H. 7. 23.*

Upon an Escape.

Action of the Case.

If one receive money of another to my use, or to deliver to me; or from me, to deliver to another, or to bestow for me, and he doth not dispose it accordingly; in all these cases I may have this Action for the money, or I may have a Writ of account, *Dyer 21. 42 Ed. 3. 9. Broo. Condition 6. 38 H. 6. 9.* If the Lord levy Aid of his Tenants to make his Sonne Knight,

Upon a Recceit.

or to marry his Daughter, and die before his Son or Daughter have received it; in this case the Son or Daughter may have this Action against the Executor of the Lord for it, and if he have not Assets it lieth against his Heir.

For a Fine or
Amercement.

For a Relief.

If a Fine or Amercement be imposed, or a man in a Court Leet after any offence; or one do forfeit a summe of money by the breach of a By-law; in these cases and for this money the Lord may have this Action of Debt, *Co. 8. 123.* But a Lord of a Mannor cannot have this Action for a Relief or Esuage due to him, but if he die his Executors may have this Action, for they have no other remedy; and it is as a flower fallen from the stock: neither may the Lord have this Action for aid to make his Son Knight, or marry his Daughter, nor for a sum of money upon a pretence of an unreasonable custom, as to have 3^{lb} of every one that shall break the pound within his Lordship, or the like, *Co. super Lit. f. 47. 83. 7 H. 6. 13. Lit. Broo. Sect. 176. et H. 7. 40.*

Upon an
Award.

If another and I do refer any difference between us to arbitrement, and the Arbitrators award the other to pay me 10^{lb}, I may recover this money by this Action: But if we did enter into Obligation each to other to stand to their award, I cannot have this Action for the 10^{lb}, and sue him upon the Obligation also, *F. N. B. 121. 33 H. 6. 2.* But for the further opening of this, we must know this.

Where and for
what cause an
Arbitrement
shall be void,
or not.
Sect. 7.

In all cases where a man doth sue for money awarded by an Award, or upon an Obligation, or Assumpsit, to perform an Award, or upon a bare submission, in which case there is an Action given upon an Assumpsit in Law, he must be sure the Award be good, for if the Award be not good, the Action will fail. And for this we must know, that in every good Award made there are these five things, 1 Matter of Controversie, and that must be arbitrable. 2 A good submission of the parties to the Award. 3 Parties to the submission. 4 Arbitrators. 5 An Award. And if either of these be wanting it cannot be a good Award. Note therefore that the faults of Arbitrements whereby they become void, and lose their force, are sometimes in some things going before the Award it self, and sometimes in the Award it self, and sometimes in some things

things following after the Award. The faults for things before are such as these, when either of the persons are not able to submit; as women covert without their husbands; or Infants, or strangers to the wrongs, or Deputies, or the like, 21 H. 7. 29. 10 H. 6. 14. *Dyer* 270. Or being able have not well submitted, as when the Award shall be made to binde strangers that never did refer any thing, and that are not parties or privies to the Award, or the things referred do not lie in Arbitrement; as where a certain Debt of 10^{lb} due by bond, or rights of Free-hold, or the like are referred, and there is no collaterall security to binde the party to perform it; For the proper things to be arbitrated are personall things and duties, as Trespasses, and the like, yet most other things are in a way arbitrable, *Dyer* 183. *Co.* 5. 78. *Dyer* 242. 22 H. 6. 30. Or the submission is not legall; or being legall it is determined by Revocation before the Award made, *Dyer* 217. *Co.* 10. 137. 4. 1. 5. 78. 8. 98. 10. 131. 19 *Ed.* 4. 1. 10 H. 7. 4. *Kelm.* 99. 17 *Ed.* 4. 5. 12 H. 7. 5. 14 H. 6. 36. 13 H. 4. 12. 8 *Ed.* 4. 16. 20 *Ed.* 4. 8.

The common faults of the Arbitrement are these; First, When the Arbitrators award something to be done to, or by a stranger to the submission. As if a Husband onely do submit to an Award, and the Award is that he and his wife shall do, have, or take a thing, this, as to the wife, is void. And so it is if it be of a stranger or any other besides the wife. As if an Award be, that one of the parties and the Arbitrator, or any stranger shall do any thing; this is void as to the stranger or Arbitrator. So if an Award be, that one of the parties and his wife shall enjoy the Land in question, or that one of the parties shall do an Act to a stranger, this is void as to the stranger, and no Action will lie for the not doing of it. So where any thing is ordered to be done with the assistance of strangers, and such as he hath no means to compell to do it. And yet an Award that a thing shall be done by the advice of a stranger that is neither party nor privie is good. So an Award that the party shall do a judiciall act which cannot be done without the help of strangers is good, *Co.* 10. 131. *Kelm.* 15. 78. *Ed.* 4. 23. 28. *Co.* 5. 78. 17 *Ed.* 4. 15. 19. *Ed.* 4. 1. 8 *Ed.* 4. 11. 19 H. 6. 38.

For default of
privy in him
by or to whom
the thing is to
be done.

For lack of
pursuit of au-
thority.

A second fault is in the Award it self, when the Arbitrators do not pursue the authority given to them by submission of the parties; and this is either in respect of the persons, things submitted, or circumstances of the submission. And therefore where an Arbitrement is made of a thing not contained in the submission, as if the submission be for all Actions personal, and the Award be made touching Actions reall also, or *à converso*. Or the submission be on condition that the Award be made by a day certain, and in writing under hand and seal and delivered; if all this be not done the Award is void, and so for the like: And hence it is that if once an Award be made, the Arbitrators cannot make another, and that an Award cannot be made by parcels, and at severall times, and yet by way of preparation it may be made at several times. But if the Award be of lesse then the submission, as when the submission be of all suits, and the Award is about some; or the submission is of all futes reall and personall, and the Award is about all reall futes, or the submission is about all difference between four men, and the Award is made for all between two of them. These and such like are good, especially where none other differences do appear to be between them, *Co.* 10. 13. 2. 8. 92. *Dyer* 216. 242. *Plow.* 306. 19 *Ed.* 4. 1. 39 *H.* 6. 9. 9 *Ed.* 4. 44. 8 *H.* 6. 18. 9 *H.* 15. *Co.* 8. 98.

For lack of
certainty.

The third common fault in the Award it self is, when the Award is altogether uncertain, as if there be divers Trespasses referred to Arbitrement; and the Award is that the one of them shall make the other amends, and say not what, this is void. So if it be that one of the parties shall enter into an obligation, with a condition to do a thing, and say not of what sum the Obligation shall be. So if it be that one shall give a Release to another, and say not what Release, or that one shall pay the other money, and say not for what, all these and such like are void; *Co.* 5. *Simons Case*, 8 *Ed.* 4. 11. 39 *H.* 6. 9. *Hob. Rep.* pl. 78. 54. And no Averment in this case can supply this defect or any other in an Award. And yet if the submission be of all the Land descended, and the Award be of white acre, and black acre, and it be averred that this was all the Land descended, this may be good, *13 Car. B. R. per Justices Berkley.*

The fourth common fault in the Award it self, that it is not satisfactory, when some wrong doth appear to be done, and no shew of amends given for it. And therefore if the differences referred be about some Arrerages of Account, and the Award is that they shall account only, or that one party supposed to have done a Trespasse, shall do his Law and be quit, or the like. But if the Award be, that one shall lend money to the other, and he for this shall release all Actions, or the like, this is good, 12 H. 7. 15 Ed. 3. 16. 9 Ed. 4. 44. So where it is awarded that one shall give the other a pinte of Wine, or a penny in recompence, or the like, this is good. So where the wrongs are equal, that either of them shall go quit against the other, 43 Ed. 3. 33. 9 Ed. 4. 44. 22 Ed. 4. 25. 19 H. 7. 37.

For lack of satisfaction.

The fifth common fault in the Award it self is, That it is made all on the one side, and nothing on the other side; and yet some wrong doth appear to be done to that side also. And therefore if all Actions between both sides are referred, and the Award is that the one party shall go quit of all Actions that the other hath against him, and say nothing of the Actions he hath against the other, or the like, this is not good. And yet if there be an acquittall, an implied discharge of the other, a small or seeming satisfaction only; in these cases it may be good. And therefore if the question be about a debt of 10^s, and it be referred, and it is awarded that he shall pay 5^s of the debt in full satisfaction, and no more. Or the things referred are divers Trespasses done by one party to the other, and it is ordered that the one shall pay the other 10^s in lieu of the Trespasses, and nothing said of the other, these are good Awards, *Et sic de similibus*, Co. 8. 98. 7 H. 6. 40. 20 H. 6. 18. 22 Ed. 4. 25. 19 H. 6. 6.

For lack of recompence to one side.

The sixth common fault in the Award it self, is, That the Award is of a thing the party hath no means to come by: and therefore if the Award be that one of the parties shall have Land out of the others hand, this is void; for an Award cannot give a Free-hold. And yet if in this case there be any Bond or Assumpsit to perform it, and he do it not, he may be sued on the Bond or Assumpsit, Plow. 11. 20. H. 6. 12. 5 Ed. 4. 7. 19 H. 6. 36. So also it is held, That an Award

For lack of means to obtain the thing.

For that it is
not final.

that one shall leveie a Fine, make a Feoffment, enter a *Retraxit*, or discontinue his Action, to pay money at a day to come, or the like, these are good. And if it be to do a collateral thing, for which there is no remedy if it be executed, it is good: And if it be not executed, yet if the submission be by specialty, it is good.

The seventh common fault in the Award, is, That the same is not final and definitive. And therefore if the Award be, that the parties shall do something by the advice of the Arbitrators, or one of them, or that they shall abide the Award of others, or of the Arbitrators at another time. If the submission be to Arbitrators, and if they end it not to an Umpire, and the Arbitrators award part, and the Umpire another part, or part at one time and part at another time, or that one shall be non-suit in such an Action, all these and such like are void, 19 *Ed.4.1.* 47 *Ed.3.20.* *Plow.11.* 24 *H.6.36.* And hence it is also that an Award of one side onely, and an uncertain Award is void, because it is not final. *Hob. Rep. pl. 306.28.* 8 *Ed.4.10.* 39 *H.6.10.12.* So if the Award be that an Act shall be done by advice of Councell, that is good. 18 *Ed.4.22.* 8 *Ed.4.14.*

Impossible.

The Eighth is when the Award is to do a thing impossible. And therefore if the Award be, that the one shall release to the other such a suit he hath against him, whereas in truth there is no such suit in *verum natura*; or do a thing at a day that is just: or release his right in the Mannor of *S.* and there is no such Mannor, these are all void, and so are the bonds and promises to perform it, 21 *Ed.4.38.* 4 *Ed.4.1.*

Unreasonable.

The ninth common fault is, that it is unreasonable: and therefore it is said, that if the thing in question be 20^s, and the Award be 30^s which is more, that this is not good by keble: but this is doubtfull, 8 *Ed.4.21.* So if the Award be, that either party shall release to the other all Actions to the day of the Award, this is void; for by this the bond or assumpsit to stand to the Award will be released also, 9 *H.6.16.* 21 *Ed.4.40.* 9 *Ed.4.44.* But an Award that one party shall give security to perform a thing to be done is reasonable and good, 3 *H.6.18.*

The

The tenth and last fault is, that the Award is to do a thing Against Law. against Law; and therefore if an Award be, that one of them shall rob or kill another, or disseise another of his Freehold, forge a Deed, or maintain suits against Law, these are void, 42 Ed. 3. 6. 2 H. 4. 9. 19 H. 6. 55.

The faults after the Award are when the Contents of the reference and submission are not pursued, and therefore if the reference and submission be conditionall to stand to an Award, so as the same be made in writing sealed, notified to the parties by such a time; if in any of these things there be a failer, the Award is void, 8 Ed. 4. 21. 1 H. 7. 5. *Dyer* 218. *Brook* Condition 46. But if the condition be to stand to the Award so as it be made and delivered by such a day; in this case if it be made by word it is good enough, *Dyer* 218. 5 H. 7. 7. If it be by divers on both sides, with condition that the Award be delivered to the parties or one of them, and it be delivered to both, or all of them on the one side, or to one of either side, it is good enough, *Dyer* 218. And if it be to be delivered before *Michaelmas*, it is sufficient that it be delivered the last day before *Michaelmas* after sun set, 37, 38 *Elizabeth. Co. B. Adjudg. Parkers Case.*

It is a good plea to this Action grounded upon a Statute or Judgement, that the Plaintiff hath sued out and made execution upon the Judgement or Statute: but regularly no matter in fait, as payment or the like, is a good plea to this Action grounded on a Record, *Dyer* 299. p. 34. 22 Ed. 4. 6. 6 H. 4. 6. If the Action be grounded on a reall contract, as if it be for Rent on a Lease of yeers, it is a good plea in barre to the Action to plead any of the matters following: (*viz.*) 1 That the Lessee was ejected out of the Land by a stranger that had title paramount that entred and kept him out. 2. That the Lessor entred upon all or part of the Land demised before the day of payment of the Rent, and doth keep out the Lessee alwaies, so that he cannot take the profits: for if the Lessee re-enter, this is no Plea. 3 That the Lessor had nothing to do with the Land demised at the time of the making of the Lease: but if the Lease be by Deed indented, then this is no Plea. 4. That the Rent was paid at the day, and

What shall be said a good Plea or Barre to this Action, and what not. Sect.

and that there is nothing Arrear, and though the Lease be by Indenture, yet payment is a good Plea. 5. Or that the Plaintiff hath Distrained for it, and recovered the money by that means, and so levy by Distresse. 6. But it is no good Plea to say that the Houses demised were so ruinous, that the Lessee could not dwell in them, and that the Lessor by Covenant or custom ought to repair them, *Dyer* 299. p. 34. 22 *Ed.* 4. 6. 6 *H.* 4. 6. *Dyer* 82, *Coo. super Litt. f.* 47. *Dyer* 212. p. 37. *Coo.* 3. 22. *Coo.* 10. 127. 37 *H.* 6. 10. *Dyer* 28. 27 *H.* 6. 10. *Dyer* 20. 6.

If the Action be grounded on a personall contract in writing, as upon an Obligation or other Especialty, if it be single or with condition to pay money at a day; it is a good Plea to say he paid or tendred, and the other refused the money at the day of payment: or that he hath performed the condition of the Obligation, or that the Plaintiff sued the same Obligation once before, supposing the Condition was broken, and was barred therein: but in case of a single Bill, payment is no good Plea, *Coo.* 5. 43. *Dyer* 256. 51. 1 *H.* 7. 14. so neither for a single summe in a Bill penall, 1 *H.* 5. 7. otherwise to the double summe in a penall Bill, for there payment of the single summe is a good Plea: and regularly no matter unlesse it be in writing is a good Plea to an Action grounded on an Especialty, as that the money was paid after the day, and the Obligation delivered up, and the Plaintiff came by him casually again. So Arbitrement or accord with satisfaction is no Plea, 21 *Ed.* 4. 41. *Lit. Sess.* 338. *Coo.* 1. 113. *Litt. Broo. Sess.* 106. 8 *H.* 7. 3. *Coo.* 5. 43. *Dyer* 51. 1 *H.* 7. 17. If it be a Debt on a Contract without Especialty, in which Action wager of Law doth lie; It is a good Plea that before this time the Plaintiff brought another Action for the same debt, and the Defendant waged his Law and barred the Plaintiff therein: or that the Plaintiff brought an Action of the Case for the same debt before, and recovered the same therein, or that he oweth nothing, but hath paid the Plaintiff, *Coo.* 4. 94. But in this case upon a Paroll Contract without Especialty, it is no good barre to say that there is a Decree in Chancery, that the Plaintiff shall release the debt and take no advantage of it: or if it be for Goods sold, that the same were

were taken from the buyer by one that had right before the day of payment, or that the Plaintiff agreed that the Defendant shall keep it for another debt the Plaintiff did owe to him, or that a stranger hath made an obligation to the Debtee for the same debt, *Fitz. bar 75. Co. 3. 22. 28 H. 6. 4.* And whether the debt be grounded on an Especialty or not, generally a good release of the debt from the party to whom it is owing, his Executor or Administrator, or that the Defendant did give, and the Plaintiff accept something else in recompence thereof, it is a good Plea in Bar. But to say the Plaintiff upon a *Justices* had a Judgement for the same debt in the County Court, it seems it is no good Plea unless Execution be done upon it: or in an Action for Rent, or a Lease, to say that he hath bestowed it upon reparations by the commandment of the Lessor, is no good Plea: or to any Action of debt, that he did grant the Debtee that he should levy it upon his Land, *Co. 6. 49. 9. Ed. 4. 50. 34. H. 6. 17. Bro. Debt. 29.*

If the Debtor make the Debtee his Executor, and he accept it: or if the Debtor take the Debtee to husband or wife: or if two or more be bound in an Obligation to a Feme sole, and she take one of them to husband; in all these cases the debt is gone and discharged, *Co. 8. 136. Plow. 364. 11 H. 7. 4. 21 H. 7. 29.*

Where and by what means a debt shall be discharged, or extinct: where not.

Sec. 9.

If a Judgement be had on an Especialty; the debt upon the Especialty is gone; and if a debt be upon a contract or Arrearages of account, and after the Debtee take an obligation from the Debtor for the money; in this case the debt upon the contract is gone (but if the obligation be made by a stranger, *contra*) for so long as the Judgement is in force, or the Obligation in being, the Creditor cannot sue upon the obligation in the first case, or the Contract or Account in the last, *F N B. 120. M. Dyer 21. Co. 6. 45. 28 H. 6. 4.*

But if one promise to a woman that if she will marry him, he will leave her worth 100^l at his death, if she over-live him; in this case their subsequent marriage will not determine this debt, but that after his death she may recover it of his Executor, *Swysb. vers. Stafford. Pasch. 17. Jac. Co. B.*

What of the debt is to be recovered

Hb

If

If a debt be due to me on an Obligation, and I take a Statute for this debt from the Obligor; this doth not determine the debt due by the Obligation, but I may sue upon either of them at my election, and if I sue upon the Obligation it is no good bar to plead the Statute, *Co. 6. 45.*

CHAP. XXXVII.

Of a Detinue.

What it is.

A Detinue is a Writ lying for me where another man hath my Goods, or Cattels, or Writings, either by finding, or by my Delivery to him to keep or to deliver over, and he doth refuse to deliver them to me, or to deliver them over according to my appointment, and doth detain them from me, or hath lost or misimployed them; in this case I may be relieved by this Writ, wherein I shall recover the thing it self detained in kind, if it be to be had, with damage to the Detainor; or if the thing cannot be had, then I shall recover damages both for the thing, and the Detainor also: or if it be to be had, it is in my choice to have the thing, or damages for it, *Terms of the Law. Co. upon Litt. 286. Kelm. 64. 18. Ed. 4. 23. Dyer 331. 22.*

Bailment or delivery, what and how it is.

Sec. 1.
Pledge.

Accompt.
Property.

For the better clearing of this learning, we must understand that Bailment or Delivery of Goods or Writings, sometimes it is conditional, that is, to be re-delivered when money is paid for something else done, and then it is but a pledge: and sometimes it is Simple, that is, when one receiveth my Goods, either to keep for me, or for my use, or to re-deliver to me again (in which cases I may take my Goods again without any request) or to deliver over to another person, and in this case before they be delivered over to him, I may countermand the authority and require my Goods again, and if he refuse to deliver them to me, or deliver them over to the third person after the countermand, I may have an Accompt against him, for the property is not altered. This Delivery is also sometimes to imploy, as when I deliver one my Goods or money to use to my profit,

profit, as to sell *meliori modo quo poterit*. And in this case if he sell it for 12^d though it be worth 100^l, or he might have had more for it, yet I have no remedy for this wrong, *5. H. 7. 18. Finches ley 179. Co. upon Litt. 286*. But in the other cases before, I have for my relief this Writ of Detinue; or if I will waive that, I may take my Goods where I can finde them, *Litt. Sect. 498*. And if I do deliver sheaves of Corn to *I. S.* to deliver over to *W. S.* and *I. S.* doth thresh them; I may lease the Corn threshed, for the threshing doth not alter the property, *38. Eliz. B. R.*

If a man lend me money, Corn, or any such like thing, he cannot expect the same again, but the like or so much. But if one lend me a horse, or any such like thing, he must have the same thing restored. And therefore if it be used to any other purpose, or otherwise then to that end for which it was borrowed or hired, albeit the thing be never the worse for this misuser, yet he may have an Action of the Case against me for it. And if the thing be lost, though it be not by any neglect of mine (as if I be robbed of it) or the thing borrowed be impaired, or destroyed by any neglect of mine, albeit I do put it to no more service then I borrowed it for; as if I put a horse I have borrowed into an old rotten house ready to fall, and it doth fall and kill him; in these cases I must make it good. But if such Goods borrowed by me perish by the act of God, without any neglect of mine, as if I put a horse into a strong house, and this house fall and kill the horse, or it die by some disease that could not be prevented by my care, or by the default of the owner; in all these cases I shall not be charged. So if a man deliver me his Goods to keep for him, and I receive them, I must answer for them, and see them safely restored at my peril, albeit I do neither undertake to keep them safe, nor promise to restore them. And therefore if in this case they be mard or impaired in my custody, and (as some hold) though it be an inevitable accident, or they be taken away out of my custody by theft or otherwise, I must answer them. And if a man deliver me (who am a Carrier) Goods to be carried for hire, and I be robbed of them, I must answer them. But if in these last cases of Goods delivered to me to keep, I take the Goods into my custody

Where and how a man shall be charged for another mans goods delivered to him or nor.

Sect. 2.
Loan.
Action of the Case.

Pledge.

with special caution that I will not answer for them; if they be stolen or hurt, or the like, there I shall not be charged. If one deliver me goods as a pledge, and before he tender the money, the Goods be stolen away from me; in this case I shall not answer for them. But if he had tendered the money at the day, and refuse to deliver the pledge, and they be after stolen away; in this case I must answer them. And in all these cases before (for the things themselves delivered) the party grieved is to have his remedy by this Action of Detinue, *S^c Germ. lib. 2. Chap. 38. 2 H. 7. 11. 2 Ed. 4. 5. Co. 4. 38. upon Litt. 89. 29 Ass. pl. 28.*

Where and in what case this Writ will lie or not, but some other, or no action at all

Sec. 3.

In all cases where this Writ may be had these things must be in the case.

1. The thing must be of that nature as for which this Action may be had: And for this it is to be known that it will lie for any personal Goods or Cattel that is valuable, and whereof, and wherein one may have property, as for Cattel, Cloth, Household-stuff, Bags of money, or Chests of money, Sacks of corn, Loads of woods, Tuns of oil, and the like, and for Charters or Writings. But this Action will not lie for money out of a Bag or Chest, nor for corn out of a Sack, or the like; because it cannot be distinguished. *Dyer 22. 1 R. 3. 2. 12 H. 7. 5.* But in this case the party must have some other Action, *Dyer 22. 29. 12 H. 8. 3. 6 Ed. 4. 11.*

2. He that brings this Writ must have right to, or a property in the thing demanded at the time of the Writ brought; or at the least he must be chargeable for it over to some other, *Co. 11. 89. 27 H. 8. 33.* As where Goods are delivered by *I S* to *I W* to my use, or to deliver over to me; in this case if *I W* detain the Goods, *I S* that did deliver them, or I my self to whose use they were delivered, may have this Action for relief, *5 H. 7. 18. F N B 38. 21 Ed. 4. 55.* So where I have right to Goods as a Harriot, Heirloom, or a *rationabilia pars bonorum*; or that an Executor hath amongst the Goods of the Testator; or that I have bought by a good contract by which the property is altered; I may have this Action to recover them, *Kelw. 184. 8 H. 7. 10. Plow. 90. Dyer 331. 30. 203.* So if one keep my pledge after the money tendered at the day, or one take

take upon him to keep my Goods; or one finde my Goods, and have them in his possession; in all these cases I may have this Action to recover them, *Coo. 4. 84. 29 Aff. pl. 28. 12 Ed. 4. 8. 27 H. 8. 13. 39 H. 6. 2.* So if I deliver my Goods to *I S* and he deliver them over to *W S*, in this case it seems I may have this Writ against either of them, *12 Ed. 4. 8.* So if Goods be given in free marriage to a man and a woman, who are after divorced; in this case she may recover the Goods by this Writ, *FN B, 139.* But if a Sheriff take a mans beasts in Withernam at my sure, and after he doth re-deliver them to the party from whom he took them, I cannot have this Writ for the Goods, *Broo. Condition 34.* Or if I finde Goods and they be stolen from me before any Action brought, it seems this Writ will not lie; and yet happily an Action of the Case upon a Trover will lie, *27 H. 8. 13.* If I deliver one a box of Jewels, or money locked or fast to keep for me, or lend a man my horse to ride, or deliver a Taylor my cloth to make a garment, or deliver my Goods to a common Carrier, or my horse to a common Hostler, and he to whom it is delivered break the box, and take away the money or jewels, ride my horse further, or do not re-deliver him; or the Tayler spoil, sell, or mar my cloth; or the Carrier lose and spoil my Goods; or the Hostler abuse or detain my horse; in all these cases I may have for the Detainer this Writ of Detinue; and for the voluntary abuser an Action of the case also, *Coo. 4. 95. 18 Ed. 4. 23. D. & St. 102. 2 H. 7. 11. 12 Ed. 4. 8.* And yet if a man take my Goods away from me, as a Trespassor, I may not have this Action, but I must have an Action of Trespass for my remedy, *Coo. 11. 89.*

Action of the Case.

Double remedy is for a double wrong or trespass.

Sec. 4.

3. The thing demanded must be once in the custody and possession of him that is to be charged, otherwise this Action will not lie, *Coo. 11. 89.* And therefore it is held that if I deliver to one a Coffer that is locked with things in it, and keep the key my self, and something be taken out of it, I cannot have this Writ, for in this case the things in the Coffer are said to be in my custody, not his. But if the whole Coffer be taken away; in this case I shall have this Action

at least for the Coffer, *Coo.* 4. 83. If one tack my Cattel on his pasture, and there they die, or thence they are stolen, it seems I cannot have this Action against him, *Per Just. Bridgman* 7 *Car. Coo.* 8. in *Cally's Case*. And yet *Just. Hutton* 21. *Jac.* at *Salum* *Assises* held the contrary.

4. This custody and possession must continue, and not be removed by an Act of Law, as Seizure, or the like, *Coo.* 11. 89. otherwise this Action will not lie. And therefore if I find goods, and before the owner doth bring this Action, I sell them away, or they be legally distrained or recovered out of my hands upon an Execution or Outlawry against the owner; in these cases the owner cannot sue me for them in this action, but in the first of these cases it seems he may have some other Action, 27 *H. 13.* 13 *Ed.* 4. 8.

4. The party to be charged must have no property in them, nor authority to take them into his possession: For if a man take my Goods or Cattel by way of Distress, as Damage-Fesant, or for a Rent, or if I leave my Goods with another, and he refuse to keep them, and yet I leave them, and then he detain them Damage-Fesant; I cannot have this Action against him, but I have other remedy if I be wronged thereby, *Coo.* 11. 89. *Broo.* 2. 43. 43. *Ed.* 3. 21.

6. The nature of the thing taken must continue. For it is held, That if the nature of the thing detained be altered, as if it be Leather, and it be made into Shoes, or if it be Parchment and Paper, and it be made into writings, that this Writ will not lie for it, *per Justice Fenner, Trin.* 38. *Eliz.* nor in this case (as it seems) can the owner take it again, as he may the Corn of sheaves threshed in the case before cited, 38 *Q. B. R.*

For writings.

If a man keep my writings from me, which concern the inheritance of my Land; if I can set forth the certainty of them, and what Land they concern; or if they be in a Bag sealed, or Chest locked (though I know not the certainty of them) I may recover them by this Writ. And herein it is policie (if I can) to declare of one Charter in special, for then the Defendant shall not wage his Law, *Coo. upon Litt.* 286. *Coo.* 1. 1. 4. *H.* 7. 7. But if a woman great with childe by her deceased husband,

band, keep the writings from the daughter and heir, whiles she is with childe, this Writ lyeth not, 41 *Ed. 3.* 11. So if two Executors be, and one of them doth deliver an Obligation to the Creditor, and he die, the other Executor surviving cannot recover it by this Writ. So if a Tenant in Fee-simple give away the Deed of the Land, his heir cannot sue for it, So if one of two Lessees for years give away the Lease, his companion is remediless for the Lease, but his Title to the Land is not hurt, *M.* 38. 39. *Eliz. B. R. Keylocks Case.*

It is a good plea to say the things were delivered to be delivered over to another, and that he did deliver them over accordingly, if there were not countermand, and so it seems it is, albeit the delivery over be after the Writ brought, 5 *H. 7.* 18. *F N B.* 138. 12 *Ed. 4.* 8. If the Writ be for a horse, it is a good plea to say, that the horse was sick of divers diseases at the time of the delivery, and that he died thereof before any request was made for re-delivery, 21 *Ed. 4.* 5. It is a good plea to say, that he offered to deliver, or did deliver the thing demanded before the sute brought, 12 *Ed. 4.* 8. So to say, that the party that did deliver the Goods did afterwards give them to the Defendant, 21 *Ed. 4.* 55. 12 *Ed. 4.* 8. So for a Taylor to say, he doth keep the garment for his money, or for an Hostler that he keeps the horse for his meat, 5 *Ed. 4.* 2. So for him that is surd for a pledge, that the Goods were stolen before the money was tendered, *Coo. 4.* 23. So if the sute be for Goods I undertook, I may shew I took them in with special caution: or that I undertook them generally, had nothing for them, and the Goods were stolen from me, *Coo. 4.* 84. 10 *H. 8.* 21. 29 *Aff. pl.* 28. 3 *H. 7.* 4. 10 *H. 7.* 26. & *Just. Dod. Hill.* 16. *Jac. B. R.* and yet in *Coo. 4.* 83. the contrary is affirmed. So if it be for Goods found, that I delivered them away before the writ was brought, 27 *H. 8.* 21. So if the Action be against me for Cattel I had to tack, that they died or were stolen; or for Goods taken out of a Coffer in my house, that the owner had the key of it; and so any other thing before shewing that the Action will not lie, may be set forth in avoidance of the Action.

What things may be pleaded in Bar of this Action, or not.

Sec^t 5.

If the Action be brought for Charters, the Defendant may plead

Garnishment. plead that they were delivered by the Plaintiff and another to him upon certain conditions, and therefore pray that the other may be warned to plead with the Plaintiff, and shew whether the conditions be performed, and this is called *Garnishment*, *Coo. 5. 90.*

CHAP. XXXVIII.

Of Dower.

What it is.
Sec. 1.

Writ of Dower,
undenihil habet.

Writ of Right
of Dower.

In what case
the wife shall
be endowed, &
shall or may
have this Writ
to recover it, or
not.

Sec. 2.

THis word doth sometimes signifie, a portion of the husbands Land given to the wife after his death for her life. For the wife by our Law is to have after her husbands death a third part of all the Land her husband had in Fee-simple, or Fee-tail during the Coverture for her livelihood; and this the wife may not enter into, and take her self after her husbands death, but the Heir, or he that hath the Land, must either assign it to her by Deed in the Countrey, or if they refuse so to do, and she have received no part of it, she may recover it by a Writ of Dower *Unde nihil habet*; or if she have received any part of it already, in one place or County, she may have her Writ of right of Dower for the rest, and by this means she shall recover it. And if her husband die seised, she shall recover damages from his death. But if there were an alienation or estate made during the Coverture, so that he did not die seised of the Land, she shall not recover damages, *Coo. 1. part. of his Instit. 31. &c. English Lawyer, f. 86. Terms of the Law, 161.*

In all cases where the wife shall be endowed of the third part of her husbands Land, there must be these things concurring in the case. 1. There must be a good marriage, for if they were not Lawfully married together, she cannot be endowed, *Coo. 9. 49*, or a man have two wives, the second cannot be endowed, *Perk. Sect. 304, 305*. 2. The husband must be sole seised of the Land. And therefore if a man be seised in Jointenancy with another of Land in Fee, and die,

his

his wife shall not be endowed of this ; but of a Tenancy in common she shall be endowed, *Litt. Sect. 45*. And the Judgement is that she shall hold her thirds in common, *Litt. 45*. 3. The thing must be dowable : For matters of pleasure, annuities, or personall services are not dowable. But of all other matters of profit, as Land, Rents, Franchises, Offices, and the like, she shall be endowed, *Coo. upon Litt. 31. 144. Coo. 6. 79. 11. 25*. 4. He must be seised of the Land of an estate in Fee-simple, or Fee-tail at the least. And therefore if he have but an estate for life or years, or any other estate, the wife shall not have Dower of this. And if her husband were Lessee for 1000 years, he shall not have Dower. And if a Lease were made to her husband and his Heirs, during the life of *I S*, she shall not be endowed, & sic de similibus. 5. He must be seised of such an estate as the Heirs of their two bodies may by possibility inherit it, *Coo. upon Litt. 31. 40. Coo. 8. 34*. And therefore if Lands be given to a man and his wife, and the Heirs of his body on the body of his wife, or to the heirs of his body ; in this case she shall be endowed. But in the first case if she die, and he die, the second wife shall not have Dower, *Coo. 8. 36. Dyer 41. 6*. He must have a seisin and possession in Deed, or in Law, of the thing whereof she would have Dower. And therefore if the Father die seised of the Land, and his son having a wife die before his entry into the Land, yet she shall be endowed upon this seisin in Law, *4 H. 7. 1. 1 H. 7. 17*. But if one be disseised, and after take a wife, and die before entry, his wife shall not be endowed : So if one die seised, and a stranger abate, and the Heir take a wife and die before entry, his wife shall not be endowed, *Coo. 2. 59. 56. Park. Sect. 266. Coo. 6. 34*. 7. The Freehold and inheritance must be in him, *simul* and *secul* during the marriage, and therefore if an estate be made to the husband for his life, the remainder to *I S* for his life, the remainder to the husband in Fee, and *I S* die, here the wife shall be endowed ; but if *I S* be alive, the wife can have no Dower, *Coo. 1. 112*. And so in like cases. But if the husband make a Lease for years only before the marriage, she shall be endowed, but must stay till the Lease be ended for

execution: if the Lease were made after the marriage, she shall be endowed presently. And if any rent be reserved on the Lease for years in the first case, she shall be endowed of the thirds of the Rent. If a Lease be made for years, the Remainder to *B* for life, the Remainder to *B* in Fee, the wife of *B* cannot have Execution till the Lease for years be ended, *Coo. upon Litt.* 230. *Coo.* 10.46. *Perk. Sect.* 335. 336. 372. 8. The husband must be dead when she doth demand Dower; otherwise she cannot have it.

And in all these cases, and such like, where she hath a right to Dower after her husbands death, she may have this Writ of Dower, *Undanihil habet*; or a Writ of Right of Dower (as her case is) for the recovery of it, either against the Heir, or a purchaser of the Land, as the case is, if he will not assign it to her. But this Writ will not lie against a Lessee for years, or particular Tenant, but most properly it is to be brought against him that hath the Inheritance, *Coo. upon Litt.* 1. part. f. 35. *Dyer* 288. 123. 264. 97. *Coo.* 9.17. 6. 57. *F N B* 147, 148. *Plow.* 141. And if the Land of which she is to be endowed be parcelled out, and in many hands, she may sue any or all of them, with this difference, That if she bring her Action against the Heir, having any part of the Land remaining in his hands, she may recover a third part of the whole from him. But if she sue a purchaser, she shall recover but a third part of the Land of the purchaser, *Dyer*, 256. *F N B*, 148.

What things
may be pleaded
in Bar and a-
voidance of
this Action,
or not.

Sec. 3.

It is a good plea in Bar of this Action, to say, that she is endowed already of the same Land, That the husband was never seised of any dowable estate, *Dyer* 41. That her husband was attainted of Treason, *Stat.* 5. *Ed.* 6. 11. That she hath a Jointure of her husbands Land made to her before marriage, and she is not evicted out of it, *Stat.* 27. *H. 8. ch.* 10. *Coo.* 4. 59. That she had a Jointure made after marriage, and she hath entered upon it, and accepted of it since her husbands death, *Stat.* 27. *H. 8. ch.* 20. That she did joyn with her husband in his life time, and levied a Fine, or suffered a recovery of the Land, *Coo.* 2. 74. 9. 97. That the husband alone did levy a Fine of the Land, and she did not make her claim in five years after her death, *Coo.* 2. 93. 8. 100. That her husband and she were divorced a vin-

cule

culo matrimonii. But if the divorce were, *à mensa & thoro* only, this is no Bar, *Coo. upon Litt.* 321. All these, and all the things before named, in the cases wherein she cannot have Dower, and many others may be pleaded in Bar and avoidance of this Action for ever.

But it is no Bar of her Dower in this Action, to say, her husband was attainted of murder, or felony, *Coo. upon Litt.* 31. or that he was out-lawed in an Action, *Perk. Sett.* 388. or that she had a Jointure made to her after the marriage, if she wave it after her husbands death, *Coo. 4. 2.* or if a Jointure be made to her after marriage, and during the Coverture she and her husband levy a Fine, or suffer a recovery of it, this is no Bar to her in her sute for her Dower, in the residue of the Lands, *Dyer* 358. *Coo. 1. 27.* nor is it a Bar to say, That her husband was an Ideot, or *non compos mentis.* *Coo. upon Litt.* Also if the woman detain the writings of the Heirs Land, this is a Bar so long as she doth keep, and for so much Land as the evidences do belong to, and this may be pleaded; but this pleas lyeth only in the mouth of the Heir, *Coo. 9. 17. Dyer 250. 127.* And if she detain the body of the Heir from the Guardian in Chivalry, this is a Bar also so long as she doth so, and may be so pleaded, *Coo. 9. 19.* So if she enter upon any part of the Land out of which she doth demand Dower, so long as she keepeth in possession of it, she is barred, *Dyer* 76. So also if after her husbands death she take a Lease for years or life, of the Land whereof she is to be endowed; so long as that Lease doth last she is barred; and this may be pleaded in avoidance of the Action, *FN B.* 149. *Perk. Sett.* 350.

Detainment
of Charters.

CHAP. XXXIX.

Dum fuit infra aetatem.

THis is a writ lying where an infant within age alieneth his Land in Fee-simple, Fee-tail, or for term of life; in this case he when he comes of age, or if he die his Heir when he comes to his full age, may have this Writ to recover the Land again, *Terms of the Law.*

What it is.

CHAP. XL.

Dum non fuit compos mentis.

What it is.

THis is a Writ, and lieth when a man that is *non compos* *mentis* alieneth his Land that he hath in Fee-simple; and dieth, and then his heir after his decease shall have this Writ to recover it again. But he himself cannot have it, for a man shall not be received to disable himself. *Terms of the Law.*

CHAP. XLI.

Of an Ejectione Firme.

THis Writ of *Ejectione Firme* is now become one of the most common actions in use, and is used frequently for trial of Titles, and is the common rote that men go to the recovery of the possession of those Lands wherein, or whereto they have a right or Title, the which they do in this method; They first enter upon the Land, and then they make a short Lease of it to some friend, and this they seal and deliver to him upon the Land, and then he enters, and being put out brings this Action, and thereby recovers his Lease and the possession of the Land. To this Action (being of every daies use) we shall therefore speak somewhat largely, and especially to these things. 1. The entry of the Lessor that hath the right, 2. The Lease made by him for the tryal of the Title. 3. The entry of the Lessee. 4. The entry upon him and his Ouster and Ejectment. 5. The Process or pleading in the Action or suit.

As touching the entry of the Lessor that hath right to the Land, there are two things considerable; 1. Whether he hath any right or title to the Land at all: for if it appear the Defendant to have right to the Land, the Plaintiffs action will fail. But this is a point too large and general to be discussed here: and yet take here these few things by the way;

1. That

1. That a man may have a right or title to that Land whereof, and wherein he hath not the possession or property. 2. Right is where Land is taken wrongfully from another by Disseisen, or the like, the challenge or claim of him from whom it is taken is called a Right. 3. There is a right of Action, which is when there is no remedy left but an Action to recover the Land, and there is a right of Entry, when the party claiming, may for his relief either enter into the Land, or have an Action to recover it; and there is a Title of Entry, which is where no wrong is done, and yet one hath a lawful course to enter upon the Land which another hath, but hath no action to recover it: As where entry is given to a man for a condition broken, upon an Escheat, the dying of a Tenant without Heir, in all which cases he must make his entry before he can bring any Action, *Pow. 558, 255. Finchely 105. Coe. 19. 48. 8. 153.*

4. The property and title of Land is made and may be gained, either by entry, as in case of occupation, where Land is granted to *I & per auter vie*, and *I & die*, in this case he that gets first in possession shall have the Estate. By descent where a man hath Land of Inheritance, and dieth not disposing of it. By Escheat where the Owner dieth seised, without any Heir, which may be because he is a Bastard, or because he is attainted of Treason or Felony. By Conveyance, and so the property of Land is transferred, and so it is passed by ten manner of waies, or by ten kinde of Conveyances, Fine, Recovery, Feoffment, Grant, Bargain and Sale. Lease, Exchange, Surrender, Release or Confirmation. Of all which See my *Book of Common Assurances at large*. A man may come by a property of Land by an execution alio, as by an Elegit or Extent, of which See in *Execution*. And Justice *Dodridge 2. part. f. 28. Coe. upon Litt. 10.*

2. If he ever had a right of Entry into the Land, the next thing considerable is; whether it do continue and be not taken away: for one may have a right of Action and no right of Entry to recover his Land; and he that will maintain this Action must make himself a Title under the Lessor that had a right of Entry into the Land when he made the Lease; for he that makes the Lease must have a power and right of Entry at the time

of the Lease made, otherwise neither the entry nor the Lease will be good, We shall therefore insist a while upon this point, to shew when a Descent will take away an Entry. For the opening whereof let these things be observed.

When an entry
is gone by a
descent or not.
Sect. 2.

1. That the Law doth much regard descents, and every descent seems to adde some strength to the Title. And therefore if one wrongfully enter upon the possession of my Land, as being a Disseisor, Abator, or Intruder, and put me out of my Freehold and inheritance by Disseisin, Abatement, &c. he may hold it against all men but me, and if I suffer him in quiet possession five years after his entry, without entry or continual claim, and then he die in possession and this Land descend to his Heir, by this means he hath gained the right of possession against me, and I have lost my right of entry, and have no remedy left me by which to recover the Land, but by a real Action Writ of entry, Assize, or the like. And this Action if I bring not in the time appointed by the Statutes of limitation, I shall lose also, and consequently my right to the Land it self, having no means to recover it, and so be without remedy, *Litt. lib. 1. cap. 6. Plow. 47. Finch. 120. D. & St. 24. 32. H. 8. 33.*

If I be seised of Land in Fee, and disseised by another, and he continue in possession five years without entry or claim, and then die, and his Heir enter; in this case my entry is gone, and I am put to my Writ of entry *Sur Disseisin* for my remedy, *Litt. Sect. 385.* So if the Disseisor give the Land in tail, and the Tenant in Tail die seised, having issue, and it descend to his issue, *Litt. Sect. 386.* So if I be a Feoffee in Fee, or Donee in Tail, and be disseised, and the Disseisor die seised, *Litt. 392.* So if a Feme sole be disseised, and after take a husband, and the Disseisor die seised during the Coverture; the entry of the wife is gone, and she is put to her Writ, *Litt. 464.*

If one be disseised of Land, and the Disseisor give the same Land to another in Tail, and the Tenant in Tail hath issue and die seised of that estate, and the issue enter; in this case the entry of the Disseisee is gone, and he is put to his Action if he wil have remedy, *Litt. c. 386.*

If a Feoffee in Fee, or a Donee in Tail be upon condition, and

and he is disseised, and the Disseisor die seised, the Feoffee or Donee hath lost his entry and is put to his Action, *Litt.* 392. If a Feme Disseisor marry a husband and have issue, and after the wife die seised, and after the husband die, and then the Heir enter, it seems the Disseisor is barred of entry, *9 H. 7. 33 H. 6.*

If an infant disseise another, and alien the Land, and the alienee die seised, his Heir within age; the Disseisee is barred of his entry, but if the Disseisor within age enter upon the Heir, as he may, then may the Disseisee enter upon the infant because the descent is defeated, *Litt.* 407, 408. If one disseise another, and make a Feoffment upon condition, and the Feoffee die seised, the entry of the Disseisee is gone: but if the Disseisor enter for the condition broken, then he may enter upon him, *Litt.* 409.

If one Disseise a man and Onste his Lessee for years at once, and die seised, the Disseisee cannot enter, but is put to his Action; but the Lessee for years may enter. But if it were a Disseisor of a Tenant for life, *Cont. Litt.* 411. If a Daughter be Disseised, and after there is a dying seised, and then the son is born, this descent will barre him of his entry, *Broo.* 450. If a Disseisor make a Lease for years, and after die seised, this will barre the Disseisee of his entry, *Broo.* 453. If an Infant make a Feoffment, and after his full age the Feoffee die seised; or a Lessee for life alien, and the Alienee die seised; or a Devise be of Land on condition, and the Heir of the Devisor enter and die seised, in these cases the entry is gone, and they are put to their Action, *21 H. 6. 7. Litt.* 96. *9 H. 6. 25.* If one bargain and sell his Land, and the Bargainee enter, and after the Bargainor enter upon him and die seised, the entry of the Bargainee is gone.

If an Abator or Intruder, or one that hath but title that may have an action, die seised, this descent taketh away entry, *Litt. Disconts Plow.* 47. *Litt.* 96. *Coa. super Litt.* 238. If the Ancestor do not die seised in Fee, or Fee-tail, but term of life onely, this will not take away entry, *Litt. cap.* 387. *Finchesley. P.* 120. If one be disseised of a Reversion or remainder onely, and die so seised, and it descend to his Heir, this will not bar him that hath right, of his Entry, *Litt.*

List. Cap. 388. 390. If there be Lord and Tenant, and the Tenant be disseised, and he Alien in Fee, and the Alienee die without Heir, and the Lord enter as in his Elcheat, here the Disseisee is not barred of his Entry, but may enter upon the Lord, for here is no descent to the Heir, *Finches's* f. 120. If one be seised of Land in Fee, or in Fee-tayl upon condition, and the condition be broken, and the Feeffee or Donee die seised, yet this doth not take away the entry of the Feoffor or Donor, but he may enter upon the Heir. So if the Feoffee or Donee on condition be disseised, and before or after the condition broken the disseisee die seised; yet the entry of the Feoffor or Donor is not gone, but he may enter upon him, *List.* 391. 22 H. 6. 11. If a Disseisor die seised, and after his Heir endow the Wife of the Disseisor of a third part, and she enter into it; now the Disseisee after the endowment is not barred of his entry into the third part, but may enter upon the Wife, *List.* 393. If a Disseisor infeoff his Father, and he die seised, and the Land descend upon him, the Disseisee may enter upon him, notwithstanding this descent, *List.* 395. If any of the younger sons enter by abatement after the Fathers death, and have issue, and die seised, or his issue die die seised, this will not barre the eldest son of his Entry. So if one daughter enter upon all the Land descended, and die seised of it: but if after the eldest son have entred, or all the daughters have entred, one of the younger sons, or one of the daughters disseise the other and die seised *Contra List.* 397. *Plow.* 306. If an Infant have cause of entry, and the descent happen while he is within age; this will not barre him of his entry. So if the right of entry happen to a Feme covert while she is so; and the dying seised be before she is sole; her entry is not lost. So if the cause of entry and descent happen while a man is *de non sane memory*, yet the Heir of such man so disseised may enter. So if the Disseisee be in prison, or out of the Realm at the time of the disseison, and dying seised, their entry is preserved for them, *List.* 402. 403. 405. 21 H. 6. 17. *List.* 437. If a Disseisor enter into Religion, whereby his Land come to his Heir, this will not barre the Disseisee of his

his entry upon his Heir, *List. 410.* If a Tenant for life be, the remainder to the right Heirs of *IS* and the Tenant for life is disseised, and a descent is cast, and after *IS* die, and after the Tenant for life die; in this case the entry of the Heir of *IS* is not gone, but he may enter, for his remainder was in *Custodia Legis, Co. 1. 134.* If one had intruded upon the King, and after the King grant away the Land, and before entry or seisure by the Patentee the intruder doth die seised, this will not bar the entry of the Patentee, *Dyer 166.* Out of all which it appeareth that if one man do wrongfully enter upon another mans possession, and put the right owner of the Free hold and Inheritance from it, he doth thereby get the Free hold and Inheritance by Disseisin, and he may hold it against all men but the Disseisee. And if such a Disseisor or Abator having the possession five years after the Disseisin or Abatement, die in possession and the Land descend to his Heir, by this the Heir hath gained the possession of the Land against him that hath right untill he can recover it by a fit real Action. And if this be not brought within sixty years after the Disseisin or Abatement, the right owner doth lose his right for ever. But then that descent which taketh away entry, must be a descent and not a succession; as if a Corporation disseise me, and there be twenty successions, this will not hurt me. And this descent must be such as hath in it these things. 1. It must be a dying seised of an estate in Fee-simple or Fee-tayle, and not for life onely. 2. It must be a dying seised of the possession and Franktenement also, and not of a Reversion or Remainder onely. 3. He that dieth seised, and he that hath right of entry do claim by several Titles, and not by the same Title. 4. The Disseisin and descent must be in time of peace, for if it be in time of War it doth not prejudice to him that hath right. 5. The Disseisor or Abator must have the quiet possession of the Land five years before the descent without any entry or continual claim, made by him that hath the right of entry of title. 6. He that hath the right of entry is of full age *infra quatuor Maria*, of sound memory, out of prison, and sole; for if the party be within age, beyond sea,

non compos mentis, in prison, or a Feme Covert at the time of his descent, it will not bar. 7. But herein the whole time from the Disseisin to the descent cast is considerable; for if the person be not privileged at all times, the descent binds: As if a Feme Covert be disseised, and the husband dyeth, and she take a new husband, and then the descent is cast: or one *ultra mare* is disseised, and he return into *England*, and then goeth beyond sea again, and then a descent is cast; in these the descent will bar the entry because of the *interim*, 9 H.7.24. *Dyer* 143. *Coo. upon Lit. Descent. Stat. 32. H.8.33.*

If one have divers children, and the eldest being a bastard doth enter after his Father's death, and quietly hold the Land without re-entry or claim all his lifetime, and hath issue, and dieth seised, and the issue enter, in this case the Action and Entry both of the *mulier* are gone, and he is without remedy. So if one have two daughters, one a bastard, they divide; and the bastard die seised of her part, and her issue enter, the other daughter is without remedy, *Lit. Sect. 401. 499. 300.* An entry also may be gone by lapse of time, and therefore if the right or title of entry did first accrue to a person more then twenty years since, and he were at that time of full age, not a Feme covert, nor in prison, nor beyond the seas, or *Non Compos mentis*; and if he were so, and have not made his entry within ten years after his full age, discovery, coming, of sound mind, enlargement out of prison, coming into the Realm or death; the entry is gone and the party barred thereof for ever, 21 Jac. 16.

Entry good or
not.

Sect. 3.

Entry of one
gives advantage to another.

Now having shewed where this entry is given, we are to shew how it must be made, and when it is well made or not, for if it be not well made, this Action is not maintainable. And for the clearing of this point, take these rules and cases following. 1. This entry is to be made by the party that hath right. 2. It is a purposed going into or setting his foot upon the Land as upon his own Land, *Coo. upon Litt. 243. Dyer 337.* 3. This may be done by the party himself that hath right to enter, or by his Attorney by warrant from him, or by another to his use, and if it be done by Attorney

ney he must have a good authority, and see he do duely pursue it, *Coq. upon Litt.* 257, 258. 4. The Lessor must have a

right of entry, for if the right of entry be taken away, the Lease is not good. And for this see the cases before. 5. He, or one of them at least that hath the right, or one for him must make the entry. But for the opening of this branch these

things must be known; 1. That one Joint-tenant, Tenant in Common or Coparcener having right to enter, may if he wil, enter for all the rest. 2. If such a person enter generally, or for or in the name of himself and the rest, and the rest do not after disagree to it, this is a good entry for himself and the rest.

And therefore if one have Issue a sone and daughter by one venter, and a son by another, and being seised of *Capite*-Land devise all to the youngest son, and die, and he enter into all, this entry shall avail the eldest son to put him in possession of the third part, *Adjudg. Smals Case, M. 14. Jac. Co. B.* But if he enter especially to his own use; as if two have right of Entry, and one of them enter, and make a Feoffment of all the Land with warranty; this Entry will not help the other. So if the other do after disagree to it, he shall have no advantage by it, *Lit.* 160. *Dyer* 53. 128. *Coq. upon Litt.* 243. 3. If the Tenant for life enter, he in remainder may take advantage by it, *4 H. 7. 9. Dyer* 53. 4. By the entry of the husband into that Land he claimeth in right of his wife, the Free-hold and possession is in the wife, *Noy* 97. 5. When the entry is not lawful, the Entry of one will not advantage another, *1 H. 6. 5. 8 H. 6. 16. 31 Aff. 33.*

4. The Entry into one part may be sufficient to gain the possession of the rest of the Land. But for the further opening of this branch these cases must be laid down. 1. If a man have right to enter into Lands or Tenements in divers Villages within one County accrewed to him at one, or at severall times, and he enter upon one part of it in one Village in the name of all the rest, to which he hath right to enter within all the Villages of that County. By this he hath gotten the possession of the whole, *Litt. Sect. 417. Dyer* 337. 227. *Coq. upon Litt.* 252. *9 H. 7. 25.* And yet some make a difference here, and grant this onely where an estate is to

Entry into
part gain the
possession of
the whole.
Sect. 4.

vest, as where the Free-hold in Law is one, as in an Heir by descent, and the possession is in no man, nor no estate to be devested, that here onely Entry into part reduceth all into possession. And therefore, that if the Lord be to enter for a Mortmain, or the Feoffor for a condition broken, or the Disseisee upon a Disseisin, and he enter upon part for all; that this is not sufficient to reduce all. But I take it the experience is otherwise, however therefore it is safest to enter upon every part of the Land, *Coo. upon Litt.* 15. 6. 252. 2. If three severall men severally Disseise one of three Acres in one County, and he enter into one of them in the name of all the three Acres, this is good onely for that he doth enter upon, and will not reduce them all in possession. And yet if these three Acres come after the Disseisin into one mans possession, there perhaps an Entry upon one may reduce all, But if one man disseise me of three Acres in one County at several times; my entry into of them in the name of all the rest will reduce them all, 14. & 15. *Eliz.* *Earl of Arundels Case.* *Coo. upon Litt.* 152. 9. *H.* 7. 25. But for the Land that lies in several Counties, there must be entries made in every Countie, 4. *H.* 7. 25. *Litt.* 417. 3. If one man Disseise me of three Acres, and make a Lease thereof to three persons for life, and I enter upon one of them in one mans possession in the name of all the rest, this will reduce that Acre onely, and is not good for the rest. And if one Disseise me of three Acres lying in three Villages in one County, and he levy a Fine of the Acre in one Village, and after I enter into one of the other Acres in the name of all the three Acres; this doth not reduce the Acre whereof the Fine was levyed, without a special Entry into it, *Dyer* 337. But if Leases were made for years of three Acres, and gotten by Disseisin to severall Tenants, an Entry into one in the name of the rest will recontinue, and revest all the three Acres, *Coo. upon Litt.* 252. And so *a fortiori*, where three Acres are in possession of three men, and I having right to them enter into one of them in the name of them all, this will reduce all the three Acres. The course is in the cases where entry is needfull upon every parcel, as where Lessees claim by severall Titles, &c. to enter upon every parcel, and

leave a friend upon it to keep the possession, & then to seal the Lease upon the principal parcel where his last entry is made, and then the Lessee doth enter upon all, and the men depart; for if he enter in one part onely, and seal a Lease of the whole, this is not good for the rest, *M. 8. Jac. Curia*. But otherwise it is where Entry into a part is good for all, as where a Disseisor hath made several Leases for years, there the Disseeise doth enter into any part in the name of all, and seal a Lease of all, and this is good for all. And if the Lessees do continue in the possession, this is an Ouster upon which the Lessee may have an *Ejectione Firme*, *Curia Pasch. 9. Jac. B. R. Lovets Case*. If I enfeoffe one of one Acre of ground upon condition, and enfeoffe him of another Acre upon condition, both Acres in one County, and both conditions are broken; in this case an entry into one Acre in the name of both is not good to reduce both. 5. The entry into parts must be in the name of all. For if one that is Disseised of two Acres in one County, enter generally into one of them without saying in the name of both, this will onely revert that Acre wherein the Entry is made, *5. H. 7. 7. Coo. super Litt. 252*. And therefore if Lands in one County be in the occupation of *A. B. and C.* and I have right to them, and I enter into one of them generally, and do not declare my intent to reduce all; it is said this is a good entry onely for that one Acre wherein I put my foot, *Per Justice Hutton at Sarum Assises, 22. Jac.* If one restrain his own entry, and make it speciall, and say that it shall be to that Acre onely, wherein he puts his foot; in this case it reduceth the possession of no more but of that part, *Coo. upon Litt. 15.* 6. If a Lease be made to *A.* and delivered to *B.* to the use of *A.* and *B.* enter to the use of *A.* and after is Ousted, *A.* may bring this Action upon the Entry, *P. 44. Eliz. B. R. Purrel vers. Bishop.*

Ouster.

And now having done with the matter of entry of the Lessee, we are to speak of Leases; for to maintain this Action a Good Lease must be shewed forth. For the opening of the Learning thereof, take these observations. 1. The Lease to try the Title must be well made, sealed and delivered,

Lease to try
the Title.
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ed, as other Deeds and Leases are to be done. For this See my Book of Common Assurances, Chap. 4. & 14. 2. The Lease and Entry may be made by the party Lessor himself, if he be of full age, and not a *Feme Covert*, or by his Attorney by a Letter of Attorney thus. The Lessor may seal and sign the Lease, and seal and deliver a Letter of Attorney at the same time to some friend, and in this he must recite the Lease and give the Attorney power to enter into the Land, and there to deliver the Lease to the Lessee as his Deed, and then the Attorney must do it in such sort as the Lessor himself is to do it, and he must not deliver it till he come to the Land. 3. The Lease must be delivered upon the Land; For if the Lessor seal and deliver the Lease before his Entry, it is void. And for this cause, if a wife and *I S* be Jointenants in Fee, and being ousted they make a Lease to try the Title, and *I S* and the Husband enter, and deliver the Lease upon the Land, or the wife after and before the ouster deliver the Lease out of the Land, this is not a good Lease by the wife. But if the husband and wife make a Lease and Letter of Attorney to enter and deliver it upon the Land, this may be good, *Trin 9 Jac. B.R. Burnel and Meridishs Case*. A Copy-holder may make a Lease for a year without License to try the Title: So may a Tenant in Common make a Lease of his part for this end.

If a Lease be made of white Acre to *B.* from off the Land, and in the Lease is a Letter of Attorney to a stranger to deliver it as his Deed upon the Land, but the Lease is not delivered, this is not a good Authority, *B.R. 4. Car.* If *A* Lease his Land to *B.* from off the land, and seal and deliver it as his Deed off from the land, *C.* being then in the land, by Disseisin, and after this the Attorney that hath power by another Deed to deliver it as his Deed upon the land doth so, this is not a good Lease to maintain an *Ejectione firme*, *Curia B.R.*

A woman Covert, or an Infant, cannot make a Letter of Attorney to seal a Lease, to try a Title, as a man of full age may do; but the husband alone may make a Lease of his wives Land, *Per Just. Turner at Lent Assises, 23 Car.* And some hold that where a Letter of Attorney may be made that this power may be given and executed by parole without writing,

ting, *Just. Jones*, 5 *Car.* If one that hath right to Land enter and make a Lease for years to one to try the Title, and the Tenant continue in possession, and then he that hath right doth enter and make another Lease to another, the first Lease continuing, and the ancient Tenant continuing in possession, the second Lessee cannot maintain this Action upon this Lease, *Curia.*

3. The next thing is the Entry of the Lessee, for unless it be proved that the Lessee after the Lease made, did enter, this Action will not be maintainable: wherein these things are to be known: 1. He must make such an Entry, as to gain the possession, for he cannot be ejected out of the possession of that wherein by Law he was never in possession. 2. His possession must continue, and not be removed.

Entry of the
Lessee.

4. The next thing to be weighed is the ouster and Ejectionment of the Lessee, for if it do not appear that the Defendant in the Action did oust and eject the Lessee, this Action will fail. For this then observe these cases. 1. The ouster must be real and involuntary: for if one enter by license and agreement of the Lessee, and (as some say) of the Lessor; this is no Ejectionment in which the Action will lie. 2. The ouster shall be taken largely against the Ejector: it is said therefore, that if *A.* Lease two Acres to *B.*, and *C.* enter upon one of them, that this is an ouster out of both Acres, *Justice Hutton at Sarum Affises*, 22 *Jac. Quere of this.* 3. If a woman do enter and continue in possession, and after the husband co-habit with her, he is no Ejector, unless he agree to it; and therefore in this case the Action is to be brought against them both. But if the Husband agree to it, the Action is to be brought against him alone. And yet a Lease was made to try a Title of a house, and the Lessees enter into it, and the wife of the party that is in possession out him, and shut the door, and after the husband cometh and entreateth in the house, and the Action was brought against the husband alone, and ruled to be good, *M. 44, 45. Eliz. B.R. Clent. vers. Classy.* 4. The continuance of the same Tenant in possession that was in at the time of sealing of the Lease, is an Ejectionment by him. 5. The Entry of a man upon

Ejectionment.
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on the Land, or the putting in of a beast into the Land after the sealing and delivery of the Lease, is an Ejectment. 6. If a Lease be made to try the Title, and the servants of the former possessor enter with their Masters Carts to do their ordinary business, and the Action is brought against the Master, it is maintainable without proof of the Masters Commandment for this Entry, *P. 1 Car. B. R. Cally vers. St William Fish's case.* 7. A Tenant in Common may by an actual Ejectment be an Ejector to, and sued by his Companion; The thing in Lease was two houses, *I. S.* was in possession of one of them, and *I. D.* in the possession of the other, and the Lease was sealed in the house of *I. S.* and the Action was brought against *I. D.* only, the principal Ejector not sued, and the Plaintiff was forced to be non-sure, *Per Inst. Aske at Summer Assizes at Glo. 1650.*

Pleading.
Sect. 7.

5. The last thing is the Process and pleading; for, admitting a good power and form of Entry, a Lease duly made and executed, an Entry and Ejectment upon the Lease, yet there may be in the proceedings in the Action fatal Errors. For this then take notice. 1. This Writ lieth not in every cause, or for any thing, for it lieth not upon a Lease of a stock of cattle, nor upon a lease of a sum of money, *in modo decimandi*; nor of a Water-course, *M. 6. Jac. B. R. Challoner, vers. Moor.* But it lieth of a Mannor, House, Land, Medow, Pasture, Tithe, or such like thing, *Co. 11. 23.* It lieth *De pomario*, *M. 43. 44. Eliz. B. R. Wright, vers. Wheatley.* So it lieth *de Coquina*, *Trin. 2. Jac. Co. B.* So also *de Cubiculo.* It lieth also of a Cole-mine, *P. 5. Jac. B. R. Comin, vers. Wheatly.* It lieth also of a Bailery, of *Salt*, *Hill 6. Jac. B. R. Saunders Case.* 2. The Writ must set forth the thing in certain for quantity and quality, as one Messuage, two Cottages, 7. Acre *ter.* 4. Acr. *prati.* 5. Acr. *pasture*, and so of Tithes. And it is not sufficient to say *de Tenemento*, or *de uno repository*, or of Messuage, and the Lands thereunto belonging, or of so much of a Messuage in the occupation of *I. S.* as doth stand upon the bank, &c. or of one close called *D.* containing three Acres to a Messuage belonging, or the like, for this is uncertain. And yet an *Ejectione Firme* of a

Gate.

Gate-house, one Acre parcell of a Mannor, a Moity, or a third part of a Mannor, or of a room of a house certainly described, is good, *Coo. 11. 59, 25. Dyer 84. 305. F N B 220. Finch, 107. Pasch. 17. Car. B.R. Trin. 17. Car. 3.* The Lease and the Declaration upon it must agree. If a *Feme Covers* and *A* be Jointenants in Fee, and *A* and her husband, and the other Jointenant make a Lease for years by Deed indented, and the Husband and *A* enter, and deliver a Lease upon the Land, and the Lessee declare upon a Lease from them three, this is naught, *9 Jac. B. R. Chria.* If the Lease be for ninety years, if three lives so long live, and the Declaration be upon a Lease for ninety years without limitation, this is naught, *Per Just. Turner at Lent Assises, 23 Car.*

CHAP. XLII.

Of an Execution.

Execution is the last performance of some Act, it is most commonly taken for the next Act which doth pursue the Judgement, which is the sentence that a Judge doth make at the end of a Cause or Suit, speaking the Law in the case, as it appears upon the proofs before him. In civill Causes it is, where a Judgement is given in any Court for the recovery of any Debt or Damage, or any Lands, or Tenements, or other things; Or a man doth acknowledge a Debt by a Recognizance or Statute (which is in the nature of a Judgement) and the party by a Writ is put into the possession of the thing so recovered by the Judgement, or acknowledged by the Statute. Briefly, it is the obtaining of an actual possession of any thing acquired by Judgement of Law, *Terms ley, Coo. upon Litt. 154.*

And some of these Executions are finall and valuable, as where the Sheriff doth take the Defendants Lands or Goods, and deliver them to the Plaintiff in satisfaction of his Debt: Or not valuable, or *quousque* tending only to an end; as when the body of the Defendant onely is taken and put in prison, where it is to lie as a pledge till the debt be satisfied,

L I

but

What it is.

How many
kinds there
are.
Sec. 1.

but this doth not satisfy the Plaintiff, *Co. 8. 89.* The means whereby this is done are by Writs, which are called Writs of Execution, and these are some of them against the person, and some of them against the Goods, and some of them against the Lands, and some of them against them all, *Co. 8. 141.*

The Writs whereby Execution is done, are for recovery of Land in a real Action, as *Habere facias seisinam*, and an *Habere facias possessionem*. And for recovery of Debt or Damage in a personall Action, a *Capias ad satisfaciendum*, *Fieri facias* and *Elegit*, *Co. 6. 51. FNB 265. Westm. 2. 18.*

Extendi facias,
Levari facias,
Liberate.

There are other Writs of Execution, which see in *De sine*, Chap. 37. And for all the Writs of Execution of a Statute, as *Levari facias*, *Extendi facias* and *Liberate*, and for a Statute and Recognizance, and that which doth concern it, See in *Statutes in my Treatise of Common Assurances*, Chap. 20.

Habere facias
Seisinam,
What it is.

It is a Writ Judiciall, and it lieth where one hath recovered certain Lands in the Kings Court, then he shall have this Writ directed to the Sheriff commanding him to put him in actual seisin of that Land, *Perk. Sect. 206. 207. 208. Terms ley 217. FNB 220.*

Habere facias
possessionem,
What it is.

It is a Writ Judiciall, and lieth where one that was evicted out of his Farm, hath recovered the same in an *Ejectionis firme*, or *Quare ejecit infra terminum*, there he shall have this Writ directed to the Sheriff to command him to put the Plaintiff into actual possession of the term again, and in execution of both these Writs the Sheriff may justify the breaking of a house to do it, if he cannot do it otherwise, *FNB 220. 221. Co. 104. 5. 91. 6. 51. Dyer 278.*

Capias ad satis-
faciendum,
What it is.

It is a Writ Judiciall, and lieth where a man hath recovered any Debt or Damages in any Action personall in the Kings Court; then he that hath recovered, may have this Writ unto the Sheriff to command him to take the body of the Debtor, and thereupon he shall be put in prison, and there shall stay without Bail or Mainprize, untill he hath made satisfaction to the Plaintiff the Debt or Damages recovered. This Writ was given by the *Stat. of Westm. 2. Chap. 11. Malb. 23. Terms ley 256. Co. 8. 141. super Lit. 289. 290.*

It is a Writ judiciall, and lieth where a man hath recovered any Debt or Damages in any Action personall in the Kings Court, thun he that hath recovered may have Writ to the Sheriff, commanding him to levy the money of the Goods and Chattels of the Defendant, and to bring it into the Court that the party Plaintiff may have it, *Coo. 3 9. Dyer 306.*

Fieri facias,
What it is.

An *Elegit* is a judiciall Writ that lieth for him that hath recovered debt or damages in the Kings Court against another, directed to the Sheriff to command him to make delivery of the one half of the patties Lands and Tenements, and of all his goods except his Oxen and Beasts of his Plow to the Plaintiff for satisfaction of his debt, *Old NB 152. Coo. upon Litt. 289. Dyer 306.* It lieth also upon a Recognisance in any of the Kings Courts.

Elegit, what
it is.

But these Writs of Execution must be had within a year after the Judgement; otherwise it cannot be had till there be first sued out a *Scire facias*, which is a judiciall Writ going out of a Record, and lying where one hath recovered Lands or Tenements, Debt or Damages, and the demandant or Plaintiff doth not sue out Execution within a year after the Judgement had; in this Case he cannot sue Execution till he have first summoned the party to shew cause why Execution should not be done, and if now he neglect to answer, or cannot be found to be summoned, then a second Judgement shall be given, that that Execution be done on the first Judgement. And in this case the Defendant may plead any matter growing after judgement, as Outlawry, Release, &c. to prevent Execution, *Coo. upon Litt. 290. Dyer 148. Coo. 3. 12.* And yet if he sue out Execution within the year, it seems he may continue it after the year without a *Scire facias*, *Old NB 163. Dyer 207, 271. Finchelsey 477.*

Scire facias,
What it is,
Sec. 2.

What Execution the Plaintiff may have upon a Judgement to recover Debt or Damage; And how, or not.
Sec. 3.

After Judgement had in the upper Bench or Common Pleas, the Plaintiff may have execution either of the body of the Defendant by a *Capias ad satisfaciendum*, or upon his Lands by *Elegit*, or upon his Goods and Chattels by *Fieri facias*. But a *Capias ad satisfaciendum* will not lie in Execution, unlesse it be in such an Action wherein and against a person, against whom a *Capias* doth lie at the beginning, as

Ll 2

Debt,

Debt, Account, Action upon the Case, Action of Trespasse, *vi & armis*, Annuity, and Covenant; in all which cases *Capias ad satisfaciendum* doth lie, but no Execution by *Cap. satisfaciendum* may be had for recovery of damages in a real Action, nor in any Action against a Duke, Earl, or Baron, or their wives, unless it be in some special cases; Nor against an heir or an Executor, but in some speciall cases, *Mag. Charta 2. ch. 18. Coo. 3. 12. Westm. 2. ch. 11. Coo. 5. 88. 6. 53. Coo. 8. 141. 11 H. 7. 15. 2 H. 4. 6 7.* If one have a Judgement against divers for one cause, and take out a *Capias ad satisfaciendum* against one of them, it seems that after this he can have no other Execution against any of the rest of the Defendants, *Trin. 9. Jac. B.R.* The Plaintiff after a *feri facias*, if Execution be not done upon it, may have an *Elegit* or a *Capias ad satisfaciendum*. But after he hath taken out a *Cap. satisfaciendum*, and the same be entred upon Record or returned, he can have no other Execution. So also it seems after an *Elegit* sued out and returned, the Plaintiff can have no other Execution by *feri facias* or *Capias satisfaciendum*, but he must have an *alias elegit*, or he may have an *Elegit* in another County, *13 H. 7. 1. Coo. 5. 87. 15 H. 7. 15. 33 H. 6. 47. 28 H. 8. 9. 19 H. 6. 4. 17 Ed 4. 4. 31 H. 7. 19.*

If one have recovered part of his debt by a *feri facias*, he may have a *Cap. ad satisfaciendum* to recover the residue, *Ad. 8. Jac. B.R. Cars Case 18 Ed. 7. 11.*

If the Defendant be arrested on a *Latus*, and lie in prison for want of bayl, and after the Plaintiff do get a Judgement against him, in this case if he will he may waive his hody, and take Execution of his Lands or Goods, *M. 4. Jac. B.R. Curia.*

If a Judgement be had against the Defendant, and he having Land, die, and the Land descend to his heir, after a *scire facias* he may have Execution by *Elegit* against the heir for this Land, *Dyer 208.* If a Judgement be given in the Common Bench, and removed from thence into the upper Bench, by Writ of error, and there affirmed within the yeat, in this case the Plaintiff shall have the same proces of Execution in that Court, as he might have had in the Common Pleas without any *Scire facias*, *Coo. 5. 88.*

If

If a Judgement be for damages against two Defendants, and the Plaintiff take out an Execution by an *Elegit* against one of them; In this case it seems he can have no other Execution against the other, 33 *H. 6.* 47. The same proceſſe of Execution as a man may have before a *ſcire facias* ſued out upon a Judgement, the ſame he may have after the *ſcire facias*, and none other. And therefore where a *Capias ad ſatisfaciendum* will not lie before a *ſcire facias* upon the firſt Judgement, it will not lie upon the ſecond Judgement, 48 *Ed. 3.* 48. 34 *H. 6.* 45.

If one be condemned in Treſpaſſe, and taken *pro fine regis*, and the Plaintiff pray he may be in Execution for him; in this caſe he cannot after have an *elegit*, or a *ſieri facias*, unleſſe the Defendant die in Execution before the Plaintiff be ſatisfied his debt, *FNB* 246. *Coo.* 5. 77. After Judgement had in an Annuity, the Plaintiff upon a *ſcire facias* may have a *ſieri facias* to levy it as it becomes due, 11 *H. 4.* 34. *Broo.* 119.

After the Sheriff upon a *ſieri facias* hath returned a *ſieri fecit non inveni emptores*, &c. the Plaintiff cannot have a *Capias ad ſatisfaciendum*, or an *Elegit*, 13 *H. 7.* 1. When the Defendant was outlawed after Judgement, the Plaintiff muſt have prayed when he was taken for the King, that he may ſtay in Execution for him alſo, for he hath no other proceſſe of Execution afterwards, nor hath he any other remedy, unleſſe it be by a new Action of debt brought upon the Judgement, *Coo.* 5. 88. No Execution can be had againſt Executors on a Judgement againſt the Teſtator, but by *ſieri facias*, and that *de bonis teſtatoris* only, unleſſe it be in caſe where he hath waſted theſe goods. But for this ſee in Executors in my Treatiſe of *Common Affurances*.

* If one have a Judgement to recover Lann, and die before he have Execution, his heir after his death may and muſt have Execution. And if there be Tenant in tayl, the remainder in Fee with warranty, and he have judgement to recover in value, and die before Execution without iſſue, in this caſe he in the remainder may ſue Execution. If one have Judgement to recover a term, or any goods, or a debt, or damages, and he die before he have Execution; in theſe

* For and againſt whom Execution ſhall be had upon Judgements for Land, Debt, or Damage, or nor; And when, and how it ſhall be done. See &c.

Heir.
Executor.

cases the Executor or Administrator, not the heir, shall have the Execution. And if one have a Judgement to recover Land and Damages together, he may have Execution of both together: But if he die his heir must have the Execution for the Land, and his Executor or Administrator must have the Execution for the damages. And so it is in case of a Judgement to remove a Nuisance, and to recover Damages for the times past. And if a Judgement be to recover a Debt belonging to his Land, or 20^l and the Plaintiff die before Execution; in this case the heir must first have a *Disfringas* for the Debt, ere the Executor sue Execution for the money; and if the Debt may be had the heir is to have him. But if the Debt cannot be had, the Executor shall have Execution for the money, *Termes ley processe*, Dyer 208. 19 Ed. 4. 5. *Coo. upon Litt.* 251. 22 H. 6. 41. But in all these cases neither the heir nor the Executor nor Administrator may have Execution of the Judgement till first they have sued out a *Scire facias* against the party against whom the Judgement was had, to warn him in, to shew cause why Execution should not be had against him; And then if he either make default, or appearing can shew no good cause why Execution should not be done against him, the Execution shall be done for the Plaintiff, as it should have been for him under whom he claims: 19 Ed. 4. 5.

Administrator

If an Administrator get a Judgement on the behalf of the intestate, and die; neither his Executor (if he have any) nor his Administrator shall have Execution of this Judgement, but the Administrator *de bonis non Administratis* of the first intestate, shall have Execution. And if an Executor get a Judgement on the behalf of the Testator, and then die; If he make an Executor he shall have Execution upon this Judgement. But if he die intestate, his Administrator, unless he have also an Administration *de bonis non Administratis* of the Testator, cannot have Execution upon this Judgement, *Coo.* 5. 9. If an Executor *durante minore etate* get a Judgement, and before Execution the Executor doth come of age, in this case the Executor himself may have Execution of this Judgement. So if one be Executor till *A* be married, and get a Judge.

Judgement, and before Execution *A* is married: in this case it seems the first Executor may sue out Execution, *M.9. Jac. B. R. Davrets Case.*

If Judgement be given against a Tenant in Tayl, and he die before Execution, it may be done by *Habeas facias scire faciam*, against the issue in tayl, *Coo. 1.94.1c6.* If a Judgement be against two disseisors, and one of them die before Execution, the whole damages shall not be levied of the survivor, but a part of it shall be levied upon the heir of him that is dead, *Coo.3.13.*

If the principall upon a speciall Bayl do not after Judgement pay the money or yield his body, then and not before Execution is to be sued against the Bayl, *Coo. 5.70.* An heir or an Executor shall never be charged by an Execution, but for so much in Lands, Goods or Chattels, as are come to his hands from the debtor, unless it be by his own false or foolish pleading. If the Defendant be taken upon a *Capias ad satisfaciendum* upon a Judgement, and he die in Execution; in this case the Plaintiff may have a new Execution against his Heirs, Executors or Administrators (as the case is) and shall recover his Debt upon his lands, goods, or chattels, *Coo. 5.86. 87. FNB 267.*

But no Execution can be had against an heir, Executor, or Administrator, upon a Judgement given against another under whom he comes, and in whose room he stands, albeit it be within a year after the Judgement had, but there must be first a *Scire facias* against him to shew cause why it should not be had, *Coo.3.11. Dyer 208.*

If two or more be bound in an obligation jointly and severally (as the manner is) and the Judgement is given against them all, in this case the Plaintiff may take them all in Execution by a *Capias ad satisfaciendum*. But he can be satisfied the debt but once, and therefore if one of them pay the debt, and any of the rest be in Execution; in this case he and all the rest are to be discharged of the Execution. So if he recover the debt or value thereof by *feri facias* or *elegit* of one of them, the Lands and Goods of the rest are to be discharged, for he shall have Execution with satisfaction but

but once. So if the judgement be on a joint bill, it seems the Law is the same; And if in these cases the judgement and Execution be had against one onely, the Sheriff may levy the whole debt of him, *Coo. 11. 7. 5. 87. 119. 4 H. 7. 8.* And yet if one have a judgement for damages against divers men for one joint Trespasse, in this case he can have but one Execution against them all. But upon this if it be against the bodies by *Capias ad satisfaciendum*, the Sheriff may take all or any of them at that time in Execution, and if it be against their goods by *Fieri facias*, he may levy it once of all or any of them. But it must be levied but once, and they must bear it equally amongst them. And therefore if in the case before, Execution be first sued out against one of them, and the damages is levied, and after another of them is sued for the same Trespasse, he may pleade Execution with satisfaction against the other, *Coo. 11. 43. 3 H. 4. 13. 20 H. 6. 11. 34 H. 6. 33. Pasf. 3. Jac. B. B. Hutchins Case.*

What things shall be liable to Execution, and the Sheriff may take by vertue thereof. Sect. 5.

Upon a *Capias ad satisfaciendum*.

Upon a *fieri facias*.

pon. 26.

Executors.

Upon a Judgement given for debt or damages in the two Courts of Record at *Westminster* generally all the Land that the Defendant hath *tempore redditionis iudicij*, or at any time after, and all the goods and chattels he hath *tempore executionis*, shall be subject and liable to the Execution. And all these may be taken in Execution by the Sheriff, into whose hands soever they become, *Dyer 306. 34. Coo. 3. 12. 34 H. 6. 45.*

Upon a *capias ad satisfaciendum*, the Sheriff can take nothing but the body of the defendant, for the Writ is to do no more but to take his body, and to detain him in prison till he hath satisfied the debt, *Coo. 5. 8.*

Upon a *Fieri facias* the Sheriff may take in Execution any Goods or Chattells reall or personall, that the Defendant hath at the time of the Execution awarded, as Lease for years, wardships, cattell, corn, household-stuffe, apparrell, and the like, and this having taken he may sell and make money of it, and this money pay to the Plaintiff, *Coo. 8. 171. 7. 39.* But the Goods or Chattels a man hath as Executor or Administrator, cannot be taken in Execution, for the Executor or Administrators own debt, as they may and must for the debt of the Testator, *Plow. 525.* And yet it hath been

held

held that the goods I have to the use of another, are liable to Execution for my debt, because they are mine by Law, and his only in equity, *M. 7. Jac. Ca. B.* So if the Defendant deliver his goods to me, to deliver over to another, that in this case before the delivery they are liable to Execution, *Coo. 9. 171.* If a man have a Lease for years in the right of his wife, and a judgement be had and Execution awarded against him, and he die before it be executed, yet it is said, the Lease is liable to the Execution. So likewise if the Defendant have a Lease for years in Jointenancy with another, *Plow. 224.* And yet if the Defendant die before execution awarded out, the Term is discharged and shall go to the survivor. But goods pledged and not redeemed, or leased for any time and the time not expired; goods distrained and continuing as a distress, goods taken in Execution for another man and another debt, are not liable to Execution. So offices of Trust which are not grantable over, may not be taken in Execution, *Dyer 363. 7 H. 6. 11. Dyer 60. Coo. 8. 171. 2 H. 4. 14.*

Upon an *Elegit* the Sheriff is to make Execution of the one half of all the Houses, Lands, Meadows, Pastures, Rents, Versions, and Hereditaments, whereof and wherein at the time of the Judgement had, or after the Defendant had any sole estate or interest in Fee-tail, or for life, into whose hands soever the same do afterwards come; so also the one half of all such Lands he doth hold in Jointenancy, so long as the Defendant doth live, and of all, if he do out-live his companion: So also if the husband and wife hold Lands for their two lives, this is extendable upon this Writ. But a right only to Land, an Annuity, Copy-hold Land, Land the husband had in right of his wife in Fee, or for life after her death, is not extendable, nor liable to Execution. And all the Goods and Chattels (except only the beasts of the Plough) which the Defendant hath at the time of the Execution made, are liable to Execution on this Writ, as on a *Fieri facias*. But none of the Goods or Chattels before Execution, *Bona fide* made away, are liable to Execution on this Writ, *Westm. 2. 18. Coo. 6. 78. 8. 171. Dyer 206. 335. Coo. 7. 59. 38. 4. 67. 78. F N B 48. Plow 224. 178. 2 H. 4. 14.*

Upon an *Elegit*.

and 260.

How the Sheriff is to doe Execution, and what shall be said to be well done by him or not.
 Sect. 6.

Action of the case.

Trespasse.

Trespasse.
 False Imprisonment.

Upon an *Ad-bere facias seisinam* or *possessionem*.
 Sect. 7.

Upon a *Capias ad satisfaciendum*.
 Sect. 8.

As to this purpose these things must be premised. 1. That if a Sheriff enter into a Franchise to do Execution, the Execution is good, *Fieri non debet, factum valet*. But the Lord of the Franchise may have an Action of the case against him for it. But if the Bailiff of a Franchise do Execution without this Franchise, it is void, and he a Trespassor in all he doth, 11 H. 4. 7. 2. If the Sheriff open or break any house to do Execution at the suit of a common person, the Execution is good, but the party whose house is broken may have an Action of Trespass against him for the breaking of the house, *Co. 5. 93.* 3. If a Sheriff do make Execution upon a *Capias satisfaciendum*, *Fieri facias*, *Habere facias seisinam*, *Habere facias possessionem*, a *Liberate*, or any such like finall Process, upon which no further Process is to go, though he never return the Execution, yet is the Execution good. But if the Execution be made by inquest, as upon an *Elegit*, or the like, there Execution is not well done, if it be not returned. If the Sheriff levy the money, and give it to the party Plaintiff, though he never make any return to the Court, it is good enough, *Co. 5. 90. 4. 67. 11. 40. 20 H. 6. 24.* 4. If the Sheriff have a *Fieri facias*, or *Capias ad satisfaciendum* against a man, and before Execution he pay him the money; in this case he cannot do Execution after: if he do, an Action of Trespass or false imprisonment lieth against him, *Per Just. Jones, & Just. Beckly, B.R. Pasch. 12. Car.*

Upon an *Habere facias seisinam*, or *possessionem*, the Sheriff is to put the Plaintiff into possession of the Land recovered according to the Writ; and if it be of a house, and he cannot otherwise do Execution of the house, he may break open the house to do it, *Co. 5. 93.* If the Judgement be for Rent, the Sheriff may make Execution by word, or by any part of the Land out of which the Rent doth issue, *F N B 179.*

The Sheriff upon his Writ is to do his best to take the body of the party in Execution, and for this purpose he is to seek for him, and if the door of his house be open he may go into his house, and take him out of the house. But he may not break open the house, nor (as it seems) may he pull the latch, and open the door if it be shut, *Co. 5. 91. 93. Dyer 67. 224.*

And

And yet if the Officer do so, and by that means doth apprehend and arrest the party, the Arrest is good, but the Officer may be punished for his excess, *Per sb. Just. Hobart. Pasch. 21 Jac.* And if the Sheriff cannot finde him he must return upon the Writ a *non est inventus*, and thereupon the Plaintiff may have a Writ of Exigent, and so outlaw him, *Dyer 67. 224.*

The Sheriff upon this Writ is to do his utmost endeavour to levy the money upon the Goods and Chattels of the Defendant, and for that purpose to enquire and seek if he can finde out any Goods or Chattels of his, whereof Execution may be made; And it will be wisdom in the Plaintiff to make a diligent search to see if he can finde out any thing to be taken hold of, and if he can discover any, to direct the Sheriff to it, who *ex Officio* is to take it, and to sell it, and if he cannot sell it, he is to return it so, and thereupon a Writ called a *venditioni exponas* shall be sent to the Sheriff to force him to sell them, and pay the Plaintiff. But for the opening hereof, these things are to be known, 1. If the outdore of the house be open, the Sheriff may go into the house, and take any thing there liable to the Execution, and being come in at the open door, it seems he may break open any of the inner doors, *18 Ed. 4. 4. Co. 5. 90. Co. 4. 74.* 2. If any of the Defendants Goods or Chattels be made away by fraud and covin of purpose to deceive Creditors, the Sheriff may notwithstanding take them in Execution, *Co. 5. 90.* 3. If the Sheriff take Leases for years or other Chattels reall in Execution, he may seise and sell them without taking an Enquest by a Jury of them, and the sale will be good, *Co. 5. 90. 4. 74.* 4. If a Sheriff after Execution made, sell Goods or Chattels, and after the judgement whereupon the Execution was had is reversed by Writ of Error, yet the sale made by the Sheriff is good and unavoidable, *Co. 5. 90.* 5. If the Sheriff sell the Goods under foot, yet the sale is good, and the Defendant hath no remedy; And yet if there be Covin between the Sheriff and the buyer, perhaps the owner may have remedy by an Action of the Case, or by some other means, *Kelw. 64.*

The Sheriff upon this Writ is to pursue the charge and direction

Upon a fieri
facias.
Sec. 9.

Fraud.

Action of the
case.

Upon an Ele-
git.
Sec. 10.

rection of the Writ (that is) to deliver to the Plaintiff the one half of the Defendants Lands he had, at, or after the time of the Judgement, and all the Goods and Chattels the Defendant hath at the time of the Execution done, But in this case the Sheriff may not do all himself, as he doth upon the *Fieri facias*. For in this case, the Lands, Goods, and Chattels must be found and prized by an Inquisition, and the verdict of a Jury, and the same, and the value thereof returned before he can deliver them to the party or sell any of them away, and then if there be any Lease for years, the Sheriff may either sell it, and deliver it to the Plaintiff, or he may deliver it to the Plaintiff at a yearly value, which he will, *Coo. 6. 73. 4. 75. 7. 39. Plow 5. 24. 441. Dyer 100. Westm. 2. chap. 20.*

If there be two severall judgements against one man, he that first sues out the *Elegit* shall have the one half of the whole, and he that sueth out the *Elegit* last shall have but the one half of that which is left, *Trin. 38. Eliz. Coo. 8. Curia in Hints Case*. If an Action be brought against one upon the Deed of his Ancestor, binding his Heirs to do any thing, and Judgement be had against the Heir; in this case the Plaintiff may either have this Execution of the one half of his Land upon the *Stat. of Westm. 2.* or (as it seems) he may have Execution of all his Land by a Writ at the Common Law, *Plow. 440.*

In what case the Defendant in execution shall be said to be discharged, or not.

Sec. 11.
By A& of God.

If a man be in Execution for a Debt upon a *Capias ad satisfaciendum*, and die under Execution, the Debt unpaid; in this case the Execution is not discharged. But the Plaintiff shall have as much remedy to take his Execution upon his Lands, Goods, or Chattels, as if he had never taken his body in Execution, *St. 21 Jac. ch. 24. Coo. 3. 86.*

By A& of Law.

If two be in Execution for one Debt, and one of them die under Execution, this doth not discharge the other, *FNB 146.*

If one be in Execution upon a *Capias ad satisfaciendum*, and the Court adjudge the judgement or the Execution erroneous, and so null it; by this the Defendant shall be discharged of Execution *Coo. 8. 143. 38 H. 6. 4.*

If one taken in Execution escape, and the Plaintiff bring his

Action against the Sheriff, or have a *Cepi* returned upon the *Capias ad satisfaciendum*, and this is filed; in this case the Defendant as to the Plaintiff is discharged of Execution for ever; But if no *Cepi* be returned, nor Action brought against the Sheriff; in this case the Law doth judge him to be out of Execution, 13 H.7.1. Plow.36.33 H.6.47.

If divers be in prison for one cause, and the Plaintiff receive satisfaction from one of them, all the rest are to be discharged, *Co.* 11.7. 2 R.3.9. But if two be bound in a Bond, and Judgement and Execution against them both, this will not discharge the other, nor shall he be discharged till the Plaintiff have received the Debt of the Sheriff, *Co.* 5.86. If one be taken by a *Capias pro fine*, in such a case wherein he shall be said to be in Execution for the Plaintiff also, and he do after sue Execution against the Defendant by *Fieri facias* or *Eleget*, in this case the body is discharged from Execution, as to the Plaintiff, 13 H.7.6. If one be in Execution by a *Capias pro fine*, and he is after taken in Execution for a felony; in this case he is discharged of the first Execution, 6 Edw.4.4. Dyer 60. If a prisoner be delivered out of Execution by Privilege of Parliament, this is no discharge, but after the Privilege is determined he may be taken again, *Stat.* 1. Jac. chap.13.

272.

If the Defendant pay the money, he is thereby to be discharged of the Execution: But if the Plaintiff make any release, defeasance, or other such like Act to the Defendant being in Execution, amounting to a discharge of the Execution; this is not a discharge *ipso facto*, but by this means the party may procure a discharge. And yet if the Plaintiff himself shall deliver the prisoner out of Execution, hereby he is *ipso facto* discharged of the Execution for ever. So if the Plaintiff acknowledge satisfaction of Record, by this the Defendant is for ever discharged, *Co.* 5.86. 6.15. *Co.* 8.152. Dyer 152. Trin.9. Jac. B.R.

By the Act of the Parties.

If the Sheriff have a man in his Custody by Process of Law, and after this a Writ of *Capias ad satisfaciendum* is delivered to him; in this case in Judgement of Law he shall be in Execution presently upon that Writ, though he never

When a man shall be said to be in Execution, or not.

ver make any actual Arrest thereupon, *Cook* §. 89. 11 *H.* 4. 13, 14. In all cases where the Plaintiff may have a *Capias ad satisfaciendum* in the suit, and the Defendant is taken by a *Capias pro fine*, or a *Capias ut legatum* after Judgement, there the Defendant shall be in Execution presently at the suit of the party, also without prayer or motion to the Court. And in all cases where he may have a *Fieri facias*, and no *Capias ad satisfaciendum*, as in Assise, Rediffesin, and the like, and the party is taken by a *Capias pro fine*, and committed to prison at the Keepers of the Liberties suit; in all these cases also, upon a prayer and motion to the Court, the Defendant shall be in Execution for the party also, but not without prayer. And in cases where the Plaintiff hath a Judgement, and doth surcease his time, so that now he cannot have Execution by *Capias ad satisfaciendum*, or *Fieri facias*. But he is put to his *Scire facias*, in these cases if the Defendant happen after to be taken by a *Capias pro fine* for the Keepers of the Liberty, or by a *Capias ut legatum*, he shall not be in Execution for the Plaintiff without prayer or motion to the Court, *Cook* §. 89. *FN B.* 121. 7 *H.* 6. 6. *Dyer* 286. 11 *H.* 7. 15. 13 *H.* 7. 1.

If a man arrested by a *Latitas* be in prison for lack of Bail, and the Plaintiff get a Judgement against him; in this case he shall not be said to be in prison, unless the Plaintiff desire it, *M. 4. Jac. B. R. Carres Case*. So in case where a prisoner is committed to a wrong prison, or unduly committed to prison, *Dyer* 197, 306. If after a Judgement given, the Judges of their own heads, or at the request of a Goaler, or the like, without any prayer of the Plaintiff, do commit the Defendant to prison, by this the Defendant shall not be said to be in Execution at the suit of the Plaintiff, *Dyer* 197.

And in all these and such like cases where the Law doth once adjudge the party to be in Execution at the suit of the Plaintiff, if the Sheriff suffer him to escape, he is chargeable for the same to the Plaintiff in an Action of Debt, or the Case; *Dyer* 306.

If the Defendant die, his body being in Execution, the Plaintiff may have a new Execution against the Lands or Goods

Debt.
Action of the
Case.

Where, and in
what case a
man shall have
a new Execu-
tion or not,
and how.

Sec. 13.

of

of the Defendant as he pleaseth. But the Plaintiff whilst he hath the body of the Defendant in Execution, can have no other Execution against his Lands or Goods, *Cork* 3, 63, 66, 86, 87. If a man have Lands in Execution by an *Elegit*, and he be wholly evicted out of it: in this case he may have a new Execution either against the Defendants Lands or Goods, as he might have had before the first Execution, onely he must first have a *Scire facias* against the Defendant, or he that comes in under him. But if a man be evicted out of part of the Land, or for a time only, so that he may take his full Execution by holding it over afterwards; in this case he shall not have a new Execution, for a man shall never have a new Execution by the Statute of 32 *H* 8. chap. 5. But in case where he is clearly evicted out of all that which he had in Execution, *Coo*. 4. 66. A new Execution may be sued against any man, who by Priviledge of Parliament shall be set at liberty, *Star*. 5. *Jac*. chap. 13.

Scire facias.

It is a Writ lying where a man hath a Judgement in the County-Court, Court Baron, or Hundred-Court against Plaintiff or Defendant, and the Execution is deferred in favour of him, then the party grieved may have this Writ to hasten it, *FNB*, 120.

Executione Judicii, What it is.

CHAP. XLIII.

Of a Habeas Corpora, Distringas Juratorum, and a Venire facias.

V*enire facias* is a Writ going out of a Record, and lying where two parties plead, and come to issue upon the saying of the Countrey, for then either party may have this Writ directed to the Sheriff, to cause to come xxxiiij lawfull men of the Countrey to say the truth upon that issue taken; and if they come not at the day of the Writ returned, then shall go forth against them a *Habeas Corpora*, and then a *Distringas*, other Writs to bring them in to try the matter; and these two last Writs are usually granted thus, *Nisi prius Justitiam venerunt, &c.*

What they are.

YMS, &c. and are returnable after the time the Judges do come their Circuit, and then are dispatched by their Commission of *Nisi prius*, Old N B, 157.

CHAP. XLIV.

Of an Idempritate Nominis.

What it is.

THis is a Writ lying where a Writ of Debt, Covenant, or the like Action is a brought against one man, or he hath entered into a Recognizance, or the like, and another man of the same Surname is taken or vexed in his Body, Goods, or Lands by that means; in this case the party vexed, or his Executors after his death, if his Goods be taken, may have this Writ directed to the Sheriff or Escheator, as the case requires for his relief, and if the mistake be found, he shall be acquitted: And if an Officer seize his Goods or Chattels, supposing him to be outlawed where he is not, but another man of the same Name, or the Surname be not well set forth; in these cases it seemeth the Writ lyeth, *Finches ley*, 454. FNB. 287. *Celw.* 89. *Dyer* 85. *Stat.* 9 H6. *cb.* 4. 37 *Ed.* 3. *ch.* 2.

CHAP. XLV.

Of a Moderata Misericordia.

What it is.

IT is a Writ lying to relieve a man, where a man is extremely and unreasonably amerced in the Court-Baron or County-Court, and the Amercement is not assented. And by this the Judges of the Court wherein the Action is brought, shall have power to try and judge of the reasonableness of the Amercement *Termes ley*, FNB, 74. *Co.* 11. 43. This is grounded upon the Statute of *Magna Charta*, *cb.* 14. which is that a Free-man shall not be amerced for a small fault, but according to the measure of the fault, and for a great fault according to the greatness of the fault.

CHAP.

CHAP. XLVI.

Of a Latitas.

IT is the name of a Writ whereby all men in personall Actions are called originally into the Upper-bench; and it hath the name from this, becaule in respect of their better expedition a man is supposed *Latitare* (i.) to lurk. Therefore being served with this Writ, he must put in security for his appearance at the day. Therefore the form of this Writ is after the return, *Non est inventum in balliva, &c. ut in curia nostra coram nobis sufficienter testatum est quod predictus, &c. Latitat & discurrit in Comitatu tuo. Ideo tibi precipimus quod capias predictum T. Si invent, &c. & eum salvo, &c. Ita quod habeas corpus ejus, &c.*

What it is.

CHAP. XLVII.

Of a Non omittas.

THis is a Writ lying where a Sheriff doth return upon a Writ to him directed against a person dwelling in a Franchise, That he hath sent to the Bailiff of the Franchise, that hath the return of the Writs; and he hath made him no answer, or hath not served the Writ; in this case the party may have this Writ to command the Sheriff to enter upon the liberty, and execute the Writ himself, which otherwise he could not do, but he would be liable to an action of the case. And in this Writ the Bailiff of the Franchise is to be warned in, and if he come not at the return of the Writ, then all the Writs that go forth afterwards in that suit shall be with a *Non omittas*, *Terms ley, Old N B. 44.*

What it is.

Action of the case.

CHAP. XLVIII.

Of a Nisi prius.

What it is.

A *Nisi prius* is a Writ lying in case where a Jury is impannelled and returned before the Justices of the one Bench or the other, the one part or the other in the Spire, making Petition to have this Writ for the ease of the Countrey, which is therefore called a *Nisi prius*, because of these words in the Writ; For when a suit is begun in either of the Benches, or in the Exchequer, and the parties in pleading vary in a point of Fact. As if the suit be for taking of Goods, and the Defendant denieth it, then the Plaintiff is to maintain that he took them, and then that issue is to be joyned between them, which is to be tried by a Jury of twelve men of that County, where it is supposed the Fact is done, and thereupon a Writ of *Venire facies* is awarded by the Judges to the Sheriff, to warn four and twenty men to come by a day, out of which twelve are to be taken to try that issue; And this the Sheriff is to execute and return. And if the parties appear not hereupon, there goeth a *Distingas* to distrain their Lands by a day, if the Triall be not before by the Justices of *Nisi prius*, as alwaies it is. So that this is but a common adjournment of the cause, the Sheriff being commanded to have the Jurors the next Term at *Westminster*, *Nisi prius*, such a day, *Venerimus Iusticiarij*, &c. *The Appendix to Justice Dadrig Treatise*, F N B 240. *Old N B 159.*

CHAP. XLIX.

Of a Partitio facienda.

What it is.

THis Writ lieth where two or more men hold Lands or Tenements together jointly, or in common and undivided, which are dividable by Law, and some of them refuse to divide them; in this case the rest may enforce them to it, by this Writ

Writ to the Sheriff, who will thereupon by a Jury of the Bailwick divide it, *Terms ley.*

CHAP. L.

Of a per Quo servitia, Quid Juris clamat, Quem redditum reddit.

THis is a Writ lying, where the Lord by Fine hath granted away his Seigniorie to me, and the Tenant will not attorn; in this case I may have this Writ to compell him to it: *Per Quo servitia, What it is. Terms ley.*

This is a Writ lying where a man by Fine doth grant to me a Rent-charge, or any other Rent that is not a Rent-service, and the Tenant of the Land out of which the Rent doth issue will not attorn; in this case I may have this Writ to enforce him to it, *Quem redditum reddit, What it is. Terms ley.*

It is a Writ lying where a man doth grant the Reversion or remainder to me of his Tenant for life by Fine, and the Tenant will not attorn; in this case I may have this Writ to enforce him to it, *Quid Juris clamat, What it is. Terms ley.*

CHAP. LI.

Of a Perambulatione facienda Rationabilibus Divisis, &c.

THis is a Writ lying where two Lordships lie together, and some encroachment is made by one upon the other; in this case both the Lords may agree, and by this Writ the Sheriff taking with him the parties and neighbours may make a Perambulation, and set the bounds as they were before: But this must be by consent, for if one refuse, then in this case the party grieved must have a Writ called a *Rationabilibus Divisis*, *Perambulatione facienda, What it is. Rationabilibus divisis, What it is.*

CHAP. LII.

Of a Quo Minus.

Quo Minus,
What it is.

IT is a Writ lying in the Exchequer, which any Fermor or Debtor to the Keepers of the Liberty, may have against any other for Debt or Trespasse in the Exchequer, in the Office called the Common-pleas, by which the Plaintiff doth surmise, that for the wrong the Defendant doth to him, he is lesse able to pay them their Debt or Ferm. And this doth give Jurisdiction to this Court of Exchequer, to hear and determine the businesse, which otherwise could not be done by this Court.

CHAP. LIII.

*Of a Quod permittat, Quo Jure, Admeasurament
of Pasture, Secunda Supererogatione.*

Quod permittat,
What it is.

IT is a Writ lying where a man is disseised or put out of his Common of pasture, and the disseisor alieneth or dieth seised, and his Heir entreth, and the Disseisee die; in this case his Heir shall have this Writ for his relief. This Writ also lieth for relief to a man against him that hath levied a Nuisance upon his Freehold. *Terms ley, Finch 95.*

Quo Jure,
What it is.

This Writ lieth where I have Land, wherein another man challengeth common of pasture, of late, within the time of memory, to enforce him to shew by what Title he claimeth this Common, *F N B 128.*

Admeasurament of pasture or common,
what it is.

This is a Writ lying where many have common of pasture in the waste or ground of another man, and one of them doth surcharge the Common, by putting on more beasts then he ought; in this case any one, or all the rest of the Commoners may have this Writ against him, or one of them may sue him that surchargeth, and all the rest; for all the Commoners must be Plaintiffs or Defendants in the suit; and by this

this means it shall be admeasured and set down how they shall take it. And if any of them do afterwards break this order, the party grieved may have another Writ, called a *Secunda super-onerations*, and thereby he shall recover Damages, and the offender shall lose the value of the Cattell, wherewith he did surcharge, to the Common-wealth, as a forfeiture, *Terms ley, F N B 225. See before Admeasurement.*

Secunda super-onerazione.
What it is.

CHAP. LIV.

Of a Quo Warranto.

THis is a Writ lying for the Keepers of the Liberty, where one hath no Title to a Franchise (as having never any, or having forfeited what he had) to recover it into their hands, and by this the party that doth claim the Franchise, is to shew by what Title he holdeth it, and if he appear not to do it, then the Franchise is to be seised for them, *Nomine districtionis* by the Sheriff, and then the party hath a time by a Replevin to avoid that seizure, and if he do it not within the time, then he doth lose his Franchise for ever, and this is to be brought before the Justices of Assise, or of Eyre: and if it be found the party do use it without Title, Judgement will be, that he shall be outed; if it be found he hath abused it, the Judgement will be that he shall forfeit it. If neither, the same Justices will allow it, and by this allowance before them the Keepers of the Liberties are bound. But an allowance in a suit in the Common-pleas will not binde them, *Coo. 9. 23. Finchlesy 322, 323. Cromp. Inr. 144, 145. Stat. of Quo Warranto, 18 Ed. 1.*

What it is.

CHAP. LV.

Of an Action of Trespass.

THe word *Trespass* in our Law is commonly taken for a wrong or offence done by one man to another. And so

What it is.

How many
kinds of it
there are.
Sect. 1.

it is sometimes against the person of a man; and sometimes against that which is his. And both these kinds of wrongs do sometimes lie in not doing somewhat a man ought to do, and sometimes in doing what a man ought not to do. These wrongs are also some of them accompanied with a kinde, or at least with a colour of violence, and so ne of them are done without any violence, and consist rather of matter of fraud or negligence. For remedy against the last kinde of offences the Action of the case is provided. And of this we have written largely in *cb. 13, &c.* But the remedy that is given for injuries done with force, or colour of force, is by this kinde of Action, of which we are now to treat in this place. And so Trespases are either extraordinary and greater, or ordinary and lesse. The great Trespases are killing or wounding a man, pulling down or firing of houses or mills, or throwing down of Park-walls or pales, and such like. The lesser are the beating of a man, entring into his Close, taking away his Goods, or the like. Both these are also either to the person of a man, or to that which is his. Of the lesser wrongs done to the person of a man, there are four kinds, or five degrees, whereof we shall speak in this place. Menacing or threatning (which is) where one doth threaten to do another any hurt. Assault (which is) where one doth unlawfully set upon and attempt to beat another, but doth it not. Battery (which is) when one doth unlawfully beat another. Maim (which is) where one doth by any violent act offered to another, take from him the use of any of his principall members of his body, whereby his strength is impaired, and he made more unfit to serve the Common-wealth. Imprisonment (which is) where a man is restrained of his ordinary and lawfull liberty, that he cannot go about his businesse, as at other times. The wrongs that are done to that which is a mans (that is) his Goods, they are to his Goods animate or inanimate. Animate, either reasonable, as Wife, Childe, Servant, Tenant, Ward, or the like; unreasonable, as beasts, fish, or the like. His inanimate good is either his Land or Plate, Household-stuff, or the like. These Trespases are also done either with pretence of Title, by which the property is altered, or without pretence of Title.

They

Menacing,
What it is.
Assault, What
it is.
Battery, What
it is.
Maim, What
it is.

Imprisonment
What it is.
Sect. 2.

Property.

They are also said to be local (that is) annexed to a place, as cutting of Trees, Grass, digging of ground, or the like; or else they are transitory, as the beating of a man, carrying away his Goods, spoiling of Writings, or the like. And for remedy against these kinde of wrongs, this Action or Writ is appointed, *Finchesley* 203. *Co. 1. part of his Inst.* 57. 126. *Old NB*, 48. *Crompt. Jur.* 33.

The word Trespass is sometimes used for the Writ of Trespass, which is where any Trespass is done by one to another, which is supposed to be done with force and arms; and by this the Plaintiff shall recover Damages according to the wrong done to him; And the Defendant found guilty of this offence is (*rigore juris*) to pay a Fine to the Keepers of the Liberty, and to be imprisoned till he pay or compound it. And this Writ must alwaies suppose the wrong to be done, *vi & armis*, *Finchesley* 198. *Old NB*, 48.

Writ of Trespass, What it is.

All persons, men, women, and children, not disabled to sue in any Action, may, having such a wrong done unto them, as for which this Action lieth, have this Action for their relief.

The Church-wardens of a Parish may have this Action against him that doth break or take away any of the Parish Goods, belonging to the Church, as the Communion Cup, Table cloth, or the like, in the custody of the present or former Church-wardens. But no Parishioner can have this Action for these Goods. And for a wrong done to the Church, by breaking the Bels, Wals, or the like, or to the Church-yard, by cutting of Trees, eating of Grass, or the like, he that is Parson of the Church by Institution and Induction, not the Church-wardens, must have this Action, *Bro. Tresp.* 289. *FNB* 90. 21 *H.* 7.2.

The Master of an Hospitall may have this Action for the Goods of the house taken away in his own, or in his Predecessors time, *FNB* 89.

Executors may have this Action for the Goods of the Testator taken out of their possession. And so may the Ordinary for the Goods he hath as Ordinary, and are taken out of his possession. But otherwise it is for the Goods taken away from the deceased. And yet the Executor shall have an Action of Trespass,

Where, and in what case this Action lieth, or not.

Sec. 3.

1. In respect of the party wronged, and who may have this Action, or not, and how.

Church-wardens.

Master of an Hospitall.

Executors.

- Trespasse *De bonis asportatis in visa testatoris*, F N B 92.117.**
- Husband and wife.** For any the least beating or imprisonment of my wife, we together may have this Action: But if it be such a beating, as whereby I lose her company or service, I alone without her may have this Action. So for any the least hurt done to my servant, he may bring this Action. But unlesse it be such a hurt as thereby I lose his service, I cannot bring this Action, 20 H. 7. 5. 22 *Aff.* 16 H. 7. 11. *Coo.* 3. 113. 10. 130. 5. 108. *Old B. of Entries*, 555.
- Master and Servant.**
- Jointenants.** If two men hold Land jointly, and Trespasse be done upon the Land, one of them alone without his companion cannot sue, for the Defendant will avoid the suit by plea, *Old B. of Entries*, 557. 587.
- He that hath the possession only.** One that hath but a bare possession of, and no good Title to Land, may have this Action for a Trespasse done upon the Land against any one that hath no right, but not against him that hath right, *Plow.* 431. 546. 3 H. 6. 32. 12 *Ed.* 4. 8. 4 *Ed.* 4. 73. And yet he that hath a Right or Title to Land only, either by Descent, Condition broken, or a Lease made to him, and he hath not made his actual Entry into the Land; in this case he may not bring this Action for any Trespasse done upon the Land, *Kelm.* 163. *Plow.* 144.
- Herbage.** He that hath but the herbage of a ground, may bring this Action for wrong done to him in the grasse of the ground, but not for cutting or spoiling the trees of the ground, *Dyn.* 285. 5 H. 7. 10.
- Lessee for years.** It hath been said, That the Lessee for years cannot have this Action against his Lessor for taking his Cattell by way of Distresse upon the Land, though there be no cause of their taking, *Finchesley* 199. 5 H. 7. 10. *Broo. Trespasse* 220. But I doubt of this.
- a. In respect of the person that doth the wrong, and who may be sued in this Action, or not** All persons male or female, lunatick, persons under age, and others that do any such wrong, for relief against which this Action is given, may be sued in this Action, *D. & St. ch.* 25. *Hob. Rep.* 176. Not only he that doth the wrong, but he that is necessary to it before or after the thing done, may be charged as principall by this Action; insomuch as he that doth command, perswade, procure or incite another to do a Trespasse,

a Trespasse, before it be done, especially if he be present at the doing of it, or doth participate with it after it is done, is a Trespassor, and the party grieved may have this Action against them all, or any of them for it, *Coo. upon Lit. 57. Broo. Trespasse 113. D. & St. 25. 12 H. 7. 15. Dyer 244.*

And therefore if a man do a Trespasse to my use, and I do afterwards agree to it, in this case I am a Trespassor, and may be sued for it, *Broo. Trespasse 256.* So if I without authority had in the time of the warre as a Commissioner with others joyned to summon a man to appear before us, and then the other Commissioners without me had imprisoned, and made him pay a Fine. It seems I shall be accounted a Trespassor in all this. *Per Justice Jermin at Glouc. Assises, 1649.* If the Master lock a man up in a Chamber, and give his man the Key, and charge him to keep it, and he knowing of the unjust imprisonment, keep him there, he and his Master both may be sued in this Action for this. And yet if the servant knew not of it, he shall not be charged, *22 Ed. 4. 45.* And if a servant do a Trespasse by the Masters command, both of them may be sued in this Action. But if the servant do more then he is commanded, as if his Master send him to distrain, and he after he hath taken the Distresse doth abuse it, or the like; in these cases the Master shall not be charged for any more then what he gave command to do, but the servant shall be charged with the whole, *21 H. 7. 21. Dyer 365.* And if my servant of his own head, without any knowledge or command of mine doth a Trespasse to another man, I shall not be chargeable with it, *13 H. 7. 15. Keln. 3.* As if the Sheriff make a warrant to his Bailiff to arrest the body, or attach the goods of *I. S.* and the Bailiff attach the Goods, or arrest the body of *I. N.* in this case no Action will lie against the Sheriff, but against his Bailiff for this, *M. 7. Jac. Coo. B.* If many come to do a Trespasse, and they are all present when the Trespasse is done, and some of them do only look on, and do nothing, yet they be all charged as Trespassors, if they do not declare their dissent to it. But if some of them fall into the company accidentally, *contra;* for they may not be sued, *Hob. Rep. pl. 69,*

Master and
Servant.

If a Court or Judge of a Court meddle with, and admit of suits in matters wherewith they have nothing to do, nor have colour of jurisdiction, as if the Court of Common-Pleas meddle with matters of the Crown, the Leet or Justice of peace with Actions between party and party, or the Court of a Mannor with Land without the Mannor; in these and such like cases where the Court, or Judge, or Justice of peace shall send out any Proceffe or Warrant to arrest, or do any Execution, and the party is thereupon arrested, or any Execution is done, he may have this Action not only against the party, or ministeriall Officers that do make the arrest, and do Execution, but also against the judiciall Officer that doth send the Warrant or Proceffe. But if the Judge or judiciall Officer have jurisdiction of the cause, and do only mistake in the manner and order of proceeding, as if in the Court of a Mannor where they should plea by plaint, if they do hold plea by Writ, or a *Capias* is awarded in the Common-pleas without an original, or a *Capias* is awarded against a Duke, or such a person against whom a *Capias* doth not lie, or proceffe doth issue out in an unjust suit, and the Sheriff or Officer doth execute this, or a Justice of peace doth send a Warrant to carry a man to Goal for felony without any information or examination; in these and such like cases the party grieved may not have this Action either against him that doth execute, or him that sent the Warrant; And yet it is said, That if a Justice send a man to Goal without Examination, that he may have this Action against the Justice, *M. 8. Jac. B.R.* And yet if in this case the Proceffe or Warrant come from a Court of Justice, it seems no Action will lie against the Judges of the Court, for a Court cannot be sued, But if a Justice of peace shall send his Warrant to an inferiour Officer to carry *I.S.* to Goal, because he doth not pay him a Debt of x^l he oweth to him, or to *L.O.* and the Officer doth execute this Warrant; in this case *I.S.* may have this Action against the Justice of peace and Officer both, *Co. 10. The Case of the Marshalsey, 8.6. 23. Aff. 64 Plow. 394. Kelw. 129.98.*

If a Justice of peace send a general Warrant to arrest a man, and expresse no cause in it, and the Officer execute it; it is said

said this Action will lie against the Justice only, and not against the Officer, *M. 8. Jac. B. R.*

If the Sheriff have a *Capias ad respondendum* against me, and make a Warrant to his ordinary Bailiff to arrest me, and he doth so, and the Sheriff doth not return the Writ; this Action will lie against the Sheriff, not against the Bailiff for this. But if the Bailiff which made the arrest were the Bailiff of a Franchise, *contra. 20 H. 7. 1. 2 H. 7. 22.* If a Plaintiff in any suit bring an unlawfull Warrant to the Sheriff, and shew him the party, and require him to arrest him; or bring him a good Warrant, and shew him the wrong party, and require him to arrest him; in both these cases the party grieved may have his Action against them both. So also for any thing done against the Goods of the Defendant by the Plaintiffs mis-information, *Broo. Tresp. 307. 99. Officer 8.* No Action will lie against an Heir, Executor, or Administrator for a Trespasse done by the Ancestor or Testator, *Actio personalis moritur cum persona.*

A Servant or Ward may have this Action against their Master or Guardian if they do abuse them, *28 H. 6. 35.* If many men do a Trespasse to me, I may sue all, some, or any one of them at my pleasure, *Coo. 8. 159.* If a man force another man to strike me, or thrust him upon my ground, for this wrong I may have this Action against him that did force, but not against him that was forced, *Hob. Rep. pl. 176. Notes Case. 2 Car. per Chief Baron at Sarum Assises.* If I deliver another my Goods to keep to my use, and he give or sell them to a stranger; in this case though I may have this Action, or an Action of the Case against him, yet I may not have either of them against the stranger, *Lit. Sect. 70. Coo. upon it.* And yet if my servant shall sell or give away my Goods to a stranger, and he take them away without delivery of my servant, it is said in this case I may have this Action against the stranger, *Noy 111. 21 H. 7. 39.* But if one man take away my Goods by wrong (that is) so take them from me, as by his taking he gets a property in them, and then he doth deliver them over to another stranger; or another stranger doth take them away from him by wrong, so that he gets a property

perty in them; in this case it seems I may not have this Action against the second taker, *Broo. Tresp.* 229. 21 H. 7. 39. And yet it is said that if a stranger buy my Goods of one that hath stolen them from me in a Market or Fair, knowing them to be stolen; in this case I may have this Action against him as well as against the thief, *D. & St.* 149. If one disseise me of my Land, and afterwards another disseise him, or he make a Feoffment or Lease of it to another, and the second Disseisee, Feoffee or Lessee do trespass upon the Land; in these cases I may not have this Action against the second Disseisor, Feoffee or Lessee, as I may against the first Disseisor, who must answer me all the Damages done by the rest, *Co.* 11. 51. 6. 7. 9. 13 H. 7. 15. 10 H. 7. 27.

If I have a free Warren or feeding in another mans ground, and the owner of the ground disturb me, I may have this Action as well against him, as I might have had it against another that did me Trespass, 5 H. 7. 10. *Dyer* 285. So the Lessee for life or years may have this Action as well against the Lessor for a Trespass done by him upon the Land, as against any other man, 5 H. 7. 10. So if a Feoffer having made a Feoffment to me upon condition, enter before the condition broken, and after the condition is broken, and then he enter again; in this case for his first entry I may have this Action against him, 10 H. 7. 22. If a Hue and Cry be levied without cause, and an Officer having some cause of suspicion arrest me, in this case I may not have this Action against him, but against him that first levied it, 21 H. 7. 27. If a Lord distrain upon his very Tenant wrongfully, and the beasts return to his Tenant, it seems he cannot have this Action against the Lord for the wrong, but he might have relieved them had they been impounded, *FNB* 96.

This Action will lie for a Maim, Imprisonment, Battery, or Assault done to the person of another. For if another man shall by any violent Act maim me (that is) deprive me of the use of any of my principall members of my body, as my hand, leg, finger, eye, one of my fore-teeth, or the like, whereby my strength is impaired, and I am made the more unfit for publike service; in this case I may either have

3 In respect of the thing done, and for what cause this Action will lie or not, but some other, or no Action at all.

Sec. 5.
Wrong to person.
Maim.

have this Action, or an appeal of Maim, which I will; and by either of these I shall recover Damages according to my hurt. But if the hurt be small only, making a deformity in the body, as when the ear or nose is cut off, or the grinding teeth put out, in these cases the party hurt hath no remedy but by this Action, *Finchesley* 204. *Stamf.* l. 1. c. 44. See *Exod.* 21. 18, 19. & 22. 5. If another man do unjustly imprison me, or keep my Wife or Ward from me, I may have this Action. But for the further opening of this point of Trespasse for an unjust imprisonment, that we may set forth where an Action of Trespasse will lie for a false imprisonment, these things are to be known. 1. If a man shall lay hands upon me, and hold me in his arms, keep me in mine own or another mans house, tie me to a Tree or Post, put me in a prison or stocks, or any other way restrain me of my liberty against my will; all these are Arrests and false Imprisonments for which this Action lieth. So if a known Officer had but said, I arrest you in the Kings Name, and had laid no hands on him, this had been an Arrest. But if one do only bid me stand or stay, and say that he doth intend or mean to arrest me, but doth not lay hands upon me; or if one carry or detain me with my consent, as a Boat-man in a Boat, Coach-man in a Coach, or the like; this is no Arrest, nor will this Action lie for this. And yet if a Coachman carry me further then I am willing, for this I may have this Action, *Coo.* 9. 66. 69. *Br. F. Impr.* 37. 10. 43 *Ed.* 3. 20. 2. The liberty of a man is much favoured in Law, and therefore if any man restrain me thereof without good warrant, and against Law, I may have an Action of false Imprisonment against him, which is in the nature of an Action of Trespasse, *FNB Trespasse, in toto.* 3. Then a man is said to be unlawfully imprisoned, when either there is no good cause for his imprisonment, or he that doth imprison hath no good Authority to do it, or having good Authority, he doth not pursue it, or he doth arrest at a forbidden time, or in a forbidden place, or the like. But we shall handle this point apart, and shew at large where an Arrest or Imprisonment shall be said to be unlawful or not, in these following cases.

Imprisonment

Arrest.

False imprisonment.

Where an imprisonment shall be said to be unlawful, upon which this Action will lie or not, but it is justifiable. Sect. 6.

In respect of
the cause, or
end, & where,
and why one
may be impris-
oned, or not.
For debt, &c.

If I owe another man money, or have done him a Trespasse, and he of his own head without any Writ, imprison me, till I pay him his debt, or till I give him a recompence for the Trespasse; or if a man imprison me till I pay him money, enter into a Bond or Statute, or make a Release, or the like; in all these cases this Action is given for my relief, *Old B. Entries*, 387 *FN B* 88. And yet in case where I am duly imprisoned by some legall Warrant, but in a false or feigned suit, where no money is due, or the money is paid, or the like; in these cases the Imprisonment is lawfull, and I may not have this Action for the Imprisonment, 43 *Ed.* 3. 35. If a man be wounded and like to die, any man may arrest him that gave the wound, and he may be kept till it be seen that the danger is past. But if he be kept after, an Action will lie for this, 16 *H.* 7. 38. *Broo. F. Imp.* 6.

For suspicion
of Felony.

If one arrest me upon a suspicion of Felony, when in truth no Felony is done; or if there be any Felony done, there is no more cause to suspect me then any other man in the world; in this case, and for this wrong I may have this Action. But on the other side, if a Felony be done, or noised abroad to be done, and there be some cause to suspect me more then another, and he that doth suspect me doth arrest me, he may justifie it, and if I sue him for it, he will avoid the suit. But for the opening hereof take these things.

1. One man may be justly suspected more then another of a Felony, if either he be a suspicious person, and generally thought to be a thief, and doth live neer the place where the Felony was done, or the goods stolen be found in his hands, or there be Hue and Cry after such a kinde of man, or if upon the Hue and Cry he fly, or if he were seen neer about the time or place, where vnd when the Felony was done, for these and many such like causes one may be suspected before another.

2. In this case he that hath cause to suspect, not another, may arrest the party suspected; for if I suspect another man for the Felony done, and tell a third person of it; in this case this third person, albeit he be an Officer, may not arrest him upon my suspicion. And yet if haply upon my relation, he also do suspect him, then he may arrest him upon his own suspicion, for

it is

it is a principle of Law, That one man cannot arrest for Felony upon another mans suspicion.

3. He that doth suspect, be he Officer or other man, may arrest the party suspect of his own head, and without any Warrant from a Justice of peace. But the common course is at this day to do it by the Warrant of a Justice of peace, and this now in respect of the common usage may be justifiable, *Communis error facit jus.*

4. If the party suspected will not submit and yeeld himself, but resist, the party that doth arrest may justify the beating of him; and if it cannot be avoided in the apprehending of him, but that he must kill him, he shall not be punished for it. Murder justifiable.

5. The party that doth arrest may justify the breaking of any house to take him, after demand of the opening of the doors. Breaking a house.

6. The party arresting after the arrest made, may bring the prisoner to a Justice of a peace, Constable, or to prison, at his choice.

7. If he bring him and deliver him to a Constable, the Constable may justify the detainment of him.

8. If the Constable after he is delivered to him, let him go, yet the Arrest of the party was justifiable.

9. If it be an Officer that doth bring the Prisoner to the Goal, the Goaler is bound to receive him, but if it be not an Officer it is said the Goaler may chuse whether he will receive him without the *Mittimus* of the Justice of peace: however (in my opinion) as he may lawfully, so he shall do well to receive him in this case.

10. If the Officer let the Prisoner go after he is delivered to him, it seems be that did first arrest him may arrest him again.

11. If the Goaler will not receive the person suspect, because he is not brought by the Justice Warrant, the party arresting may carry him back, and tak course to secure him.

12. If the prisoner be sick, he may keep him in his house a while, till he be fit to be carried, and if he be dangerous or desperate, he may secure him a while in the Stocks, or manacle him, if need be.

13. If the Constable arrest a man for Felony, and he fly, and

and another man without command of the Constable arrest him, it hath been said that this Arrest is unlawfull, *Sed quare*, for I doubt it, *Broo. F. Imp. 24. 27. Trespass 9 207, 335. 13 Ed. 4. 9. 7 H. 4. 3. 14 H. 8. 1. 27 H. 8. 23. Plow 40. 13 H. 7. 10. 5 H. 7. 4. 19 Ed. 4. 9. 22 Ed. 4. 25.*

Night-walk-
ers.

Watchmen and Constables, and such like Officers may arrest night-walkers that are suspicious, and keep them all night, and if there be cause, as if they be dangerous, the Officers want help, or the like, put them into the Stocks till the morning, and then bring them to a Justice of Peace to be examined. But if such Officer shall arrest and use me so without any cause of suspicion at all, I may have remedy by this Action, *Str. 5 Ed. 3. ch. 14. 4 H. 7. 15. Co. 9. 68.*

By agreement.

If I binde my self to pay money, and agree that if I pay it not the Debtee himself shall take and imprison me till I pay it, if he do so I may have this Action for it, *28 Ed. 3. 3.* So if a Keeper suffer me (being his prisoner) voluntarily to escape, upon my promise that if I render not my self again by a day, that he shall arrest me, and I do not, and thereupon he do arrest me, I may have this Action against him, *Co. 3. 44.*

Ward.

If I be a Ward to one by Tenure, and he by himself or some other seise me, and keep me, no Action lieth for this, *Plow. 294. Broo. Impr. 13. 21 H. 6. 5. Old B. Entries, 584.*

Fine.

If one imprison me for a Fine imposed upon me in a Leet, except it be in case where the Lord can prescribe to imprison for a Fine; in this case I may have this Action. And yet regularly wheresoever a man is fined in a Court of Record, he may be imprisoned, for imprisonment is incident to a Fine till it be paid, *Broo. Impr. 97. Co. 8. Godfrey's Case.* If a man be mad, and like in his fury to do mischief to himself or others; in this case his friends may binde or shut him up to prevent it, or if one be like to be drowned or burned, any man may pull him up out of the fire or water with violence to save him, no Action will lie for this, *Plow. 18. Br. f. Imp. 35. Old B. Entries, 555.* So if men be fighting, or about to fight, and like to kill one another, any one may take and keep away one of them from the other, and if need

To prevent
hurt.

Mad-man.

To keep peace
and prevent
murder.

be lock him up in a house for a reasonable time, till the heat be past, to the end that he may not kill nor be killed, and no Action will lie for this, for it is justifiable. For the better understanding of this, take these cases :

1. If two men be fighting, any man may stand between them to part them.

2. And yet if in this case a man shall use them more extremely than he need, or do any thing before there is need, for this he may perhaps be liable to this Action. And therefore if an Officer shall upon a few hot words take one of the parties and put him in the stocks, or if an Officer after an affray is parted and when no hurt is done, shall carry one of the affrayers to prison, or when there is cause shall keep the affrayer longer then is needfull, he may be liable to this Action, *Broo. Imp.* 3.

3. If one be about to do a robbery, threaten to kill another, abuse an Officer, or be taken in incontinency, or the like, the Officer may arrest him, and carry him to a Justice to put in bail, or be ordered according to Law.

4. If the Justice do nothing with him, yet the Arrest is lawfull by the Officer, § *H. 7. 6. Broo. F. Imp.* 20. 13 *H. 7. 10. Old B. Entries* 554.

If any men ride armed terribly, or any Insurrection be, all Officers of the peace and others in their assistance, may arrest, in prison and disarm them, *Broo. Tresp.* 184.

If one arrest me on a Justice of peace Warrant, and I get away from him against his will, he may take me again where-ever he can finde me, and justifie it. So likewise may a Sheriff his prisoner in Execution for Debr. And yet if the Sheriff shall suffer him voluntarily to escape, and after arrest him again ; this second arrest is unlawfull, and this Action may be had for it : otherwise it is (as it seems) upon a second Arrest by a Justice of peace Warrant, *Broo. Imp.* 18. *Co.* 3. 44.

A Justice of peace may require any man to give sureties of the peace or good behaviour, and if he refuse to doe it, may cause him to be imprisoned. And if a man arrested by the Warrant of a Justice of Peace to bring a man to give

Escape.

Sureties of peace.

Sureties for the peace or good behaviour, shall refuse to put in Bail, the Officer without any new Warrant may carry him to Goal; And if the Warrant from the Justice be to bring him before him, or some other Justice of the peace of the County, the Officer, not the prisoner, shall have the choice to what Justice of peace to bring him; if therefore he bring him to one he is not willing to go to, or if he refuse, carry him to Goal, he may not have this Action against him for this, *Cook* 5. 59. *Old B. Entries*, 598, 599, 560. *Broo. Trespass* 177. 5 *H. 7. 6.*

Officers.

A man may be imprisoned for divers other causes, and in divers other cases, as for divers offences done against the Common Law, as an Officer for neglect of his duty, an Officer for making of a false return, and the like. And therefore if a man be duly imprisoned for any such cause, he may not have this Action for this imprisonment. But if one be imprisoned for any other cause for which imprisonment doth not lie, the party grieved may have this Action, *Broo. Impr.* 2. 7. Also a man may be imprisoned for divers causes, and in divers cases, by Authority of divers Acts of Parliament, as for Arrearages of Account before Auditors, in cases of Witchcraft, Forgery of Deeds, forcible Entry, Riot, Rout, unlawfull Assembly, for lack of Distresse sufficient, or refusing to pay a Rate or a penalty for an offence done, Officers for refusing to execute their Office, or to account, Alehouse-keepers for selling Ale after they are suppressed, Officers or others for not obeying the Orders and Warrants of Justices of peace in or out of Sessions, Fore-stallors, Regrators, Ingrossers, Rogues, and many others. And therefore in all these cases where the Law doth warrant an imprisonment, and the party is duly imprisoned according to that Law, he may not have an Action of false imprisonment against him that doth arrest him, or for this imprisonment.

In respect of
the Authority
by which it is
done.

Seft. 7.

Then an Imprisonment is said to be unlawfull, and gives this Action, when albeit the cause may be good, yet 1. He that makes the Arrest doth it without any colour of Authority at all, as when a Creditor of his own head with-
out

out Authority from any Court shall Arrest the Debtor for his Debt. Or 2. If he have a colour of Authority, yet he hath no good Authority: as when a Court or Officer shall give a power, not having it, to Arrest a mans body; or a Corporation, without a Customs, shall make a Law of imprisonment, and under this Authority a man doth Arrest, or a Constable shall Arrest a scold, and put her in the Cucking-stool before she is presented in a Court, and he have a Warrant to do it. Or 3. When a Court or Officer hath a good power, but doth not well make it out, as if the Judges of the Common-Pleas by word, without a Writ, command the Arrest of a Debtor, or sends a Writ without a seal, and the Sheriff doth execute it; and yet a known Officer in a Corporation may Arrest by his Mace without any precept. Or 4. When the Authority is well made forth, but it is not well pursued and executed; As when a Warrant is made to three *Conjunctim & Divisim*, and two of them do it, it seems this is not good, but all or one of them may do it, and this is good; or if the Warrant be to cause one to finde sureties of the Peace, or to Arrest him, and the Officer do Arrest him before he require sureties, and he refuse it; So if the Warrant be to Arrest him if he doth not give Sureties, and he do give sureties, and yet the Officer doth Arrest him afterwards: And yet it doth not help in these cases, if when the Arrest is made it be done without Warrant, or without a good Warrant: if the party Arresting do afterwards procure a good Warrant, this will not make the Arrest lawfull, *Coo. 4. 64. 8. 67. 10 H. 7. 17. 26. Broo. Tresp. 339. 5 Ed. 4. 12. Broo. F. Imp. 17. Dyer 142. 244. 14 H. 8. 16. Coo. 9. 66. 344. Ludlows Case B.R.*

1. Any other man as well as a Constable may arrest a man out-lawed, or suspect of Felony, and no Action will lie for this, *Plow. 49. Dyer 120.*

In respect of the party arresting. Sect. 8.

2. A Watchman or Constable *Ex officio*, may arrest suspicious persons walking by night, and secure them. But other persons that are not Officers it seems may not do so, if therefore such persons shall do so, the party arrested may have this Action, *Coo. 9. 68. 4 H. 7. 5. 18. Stat. 5. Ed. 5. 14.*

3. Constables and such like Officers, may *Ex Officio* arrest persons breaking the peace, or committing lewdnesse together. But other men cannot do so, unlesse it be in case of an affray and danger of murther, to part them, and keep them asunder only till the heat be past; And therefore if I and another be fighting, and one that is no officer take me and put me in the stocks, I may have this Action against him, *Finchesley* 336 *Fir. Bar* 202. 12 H. 7. 18. *Br. F. Imp.* 28.

4. If a Constable make a Deputy, and the Deputy arrest me in case where the Constable may arrest; it seems this is lawfull and not Actionable, *M.* 13. *Jac. B. R. Plelps Case.*

5. If a Sheriff, Constable, or any such like Officer, in the Execution of his office (being to arrest me) require others to aid him, and they do so, I may have this Action no more against them then against the Officer himself, for men are bound in these cases to assist, *Coo.* 8. 6. 5 H. 7. 15. *Breo. Trespasse* 335.

6. A Justice of peace himself may require any man to give sureties of the peace or good behaviour when he hath cause, and if the party refuse, he may himself arrest and imprison him, *Breo. Trisph.* 177.

In respect of
the party ar-
rested.
Sect. 9.

Any person, Lay or Ecclesiastick, but Barons and Peers (who are priviledged persons) may be Arrested; and for these also, if a Sheriff have a *Capias* out of the Common-pleas to arrest such a person, and he do arrest his body, hereby the Sheriff may not be charged in this Action, *Fieri non debet, sed factum valet*, *Coo.* 8. 67. *Breo. F. Imp.* 19. If an Officer having Warrant to arrest another man, by mistake arrest me; in this case I may have this Action against him, and albeit the Officer be led into this error by the misinformation of the Plaintiff or any other, yet this will not excuse him, *Trin.* 38. *Eliz. B. R. Cooks Case Kelm.* 129. *M.* 5. *Jac. Goldsmiths Case.* And if the Sheriff have a Writ against *J. S.* and he come to me and ask me if my name be *J. S.* and I say Yes, and then he say, If your name be *J. S.* I arrest you at the suit of *J. W.* and he do arrest me, this arrest is unlawful, and I may have this Action against him for it, *Trin.* 7. *Jac. B. R.* And yet if the Sheriff have a proceffe against one of my

my name, and there is no distinguishing addition in the Process whereby he may know which of us is intended, and the Sheriff arrest me in stead of the right man, I may not have this Action in this case against the Sheriff, nor have I any other remedy but by an *Idemnitatem nominis*, *Broo. F. Imp.* 19. If a Warrant be intended against me, but my name is mistaken, and another name inserted in the Warrant, and by this Warrant the Officer doth arrest me; in this case I may have this Action for this arrest, *Broo. F. Imp.* 38.

1. If a Sheriff or any of his Officers arrest a man upon a Writ after the day of the return thereof is past, this is unlawful, and the party arrested may have this Action: And so some say the Law is, if he do arrest before the day of the Test of the Writ, *Coo. 8. 66. Dyer 242.* And yet if a man be arrested on a *Capias* or a *Latitat* the morning of the same day whereon the Writ is returnable; it seems this is a good and justifiable arrest, *Trin. 3. Jac. per two Judges.*

2. If a Warrant of a Justice be to arrest and bring a man to the next Sessions, and the Officer do thereupon arrest him after the Sessions, this is an unlawfull arrest, *Trin. 9. Car. B. R.*

3. If one have a Warrant to arrest me from a Justice of Peace or the Sheriff, and before the Warrant is executed the Sheriff or Justice of Peace is discharged of his Office, and the Officer hath notice of it, and yet he do afterwards arrest me upon this Warrant, in this case I may have this Action, *Dyer 41.*

4. An arrest may be upon any day of the week, and upon any part of the day or night; and yet let the Officer see to it, for if he use to make Arrests on the Lords day, or if he arrest a Minister going to, or returning from the Church, or in the Church, especially whilst he is about the service of God; this is an offence that was punishable in the Star-chamber, and is punishable by binding the offender to the good behaviour*, *Coo. 9. 66. Trin. 3. Jac. per 3. Justices. Stat. 1. R. 2. Ch. 15. 50 Ed. 3. 5.*

5. If a Warrant be from a Justice of Peace directed to an Officer to cause me to finde Sureties of the Peace, and I hear-

In respect of
the time of
the Arrest.
Sec. 10.

* By the new
Act of Parli-
ament April 19.
1650. all Ar-
rests on that
day, save only
for Felony,
breach of the
Peace, and
profanation of
the-day, are
made unlaw-
full, and the
Arresters to
be punished.

ing of it, do voluntarily binde my self before a Justice of peace, and have a *Superfedras* from him, and give notice hereof to the Officer, and yet he do afterwards arrest me, I may have this Action against him, *Polton de pace* 10.

In respect of
the place.

Se^ct. 11.

1. An Arrest may be in any place, Church, House, or Field, only let the Officer see to it, that he do it not in the Church, especially that he disturb not the service of God; for however the Arrest be good, yet the thing done is a misdemeanour punishable, so also let him take heed that he enter not into another mans house to make his Arrest, when it is in a suit brought by a private person, and not in case of the Common-wealth, wherein one may justifie the entering into and breaking of a house, if a man cannot otherwise do it. And let him see he do it within his own Precinct, for in these cases he may make himself liable to this Action: And yet in case of Arrest in another mans house, the Arrest is good, and the Officer not punishable for this by any Action of the party arrested, but the Owner of the house may bring this Action for his entry into the house, *Co. 9. 66. 14 Jac. B. R. per Ch. Justice.*

2. If the Officer Arrest a man in a Franchise or privileged place (within his Precinct otherwise) this Arrest is good, And yet the Lord of the Franchise may have an Action of the Case against the Officer for intruding into his Franchise, *Co. 9. 66. Ch. Just. B. R. in 14 Jac.*

Escape

3. In some cases the Sheriff or other Officer may go out of his County or Precinct, as the Sheriff upon the escape of a prisoner, or a speciall Writ to remove a prisoner. But if a prisoner be with his Keeper only in another County where the Sheriff hath not to do, and unlesse it be in the cases before; this is an escape, and the prisoner may have this Action against the Sheriff, *Dyer 66.* Also the Justice of Peace may specially command an Officer out of his Precinct, and by such speciall command an Officer may Arrest out of his Precinct, *Brown. F. Imp. 26. Westm. ch. 1. 34.*

In respect of
matter subse-
quent to the
Arrest.

Se^ct. 12.

If a Sheriff or a Bailiff of a Franchise Arrest me upon a *Capias ad Respondendum*, and afterward he do not return the Writ, or do return him *Non est inventus*; in these cases I may have this Action, *Co. 5. 90. Keln. 3. 66. 89 3 H. 7. 11.*

If

If the Sheriff or his Bailiffs Arrest me, and I am bailable and offer them sufficient bail, and they refuse it, for the imprisonment afterwards this Action lieth, *Dyer 25. Plow. 60. FN B 152.* False return. Refuse bail.

If any Officer after I am to be discharged, having put in bail or otherwise, Keep me, or having let me go, Arrest me again for undue Fees: I may have this Action for the detainment afterwards. But for due Fees it seems the Officer may keep the prisoner till he pay them. For Fees.

If one after he hath arrested me, when he should carry me to a Justice, or to a Goal that I may be in a way of trial or delivery, he keep me at his house, or in another place, unlesse it be in a case of necessity, and so long as the necessity shall continue; I may have this Action against him, *Keln. 45. Plow. 38. Broo. F. Imp. 25.* Keep the prisoner from trial.

If a known sworn common Bailly Arrest me by a Warrant from the Sheriff, and I submit to the Arrest, and desire sight of the Warrant, and he will not shew it, nor declare the contents of it (that is) shew the cause, or in whole suit, and for what summe, and in what Court, &c. I may have this Action against him, and if it be another Bailiff, he must shew the Warrant it self, otherwise the party arrested may have this Action against him. But in case where I do not desire the sight of the Warrant, or do not submit to the Arrest, but strive to escape, in this case the Bailiff is not bound to shew the Warrant, or declare the contents of it, *Coo. 9. 69. 6. 55. 21 H. 7. 23. 14 H. 7. 9.* Refuse to shew his Authority.

If a Justice of peace send for a man about a felony, and then presently send him to Goal without any examination; it seems this Action will lie for him against the Justice of Peace, *M. 8. Jac. B. R.* If the Sheriffs Bailly having Arrested me upon an Execution, I pay the money and get a *Superfideas* from the Sheriff to discharge me, and the Bailiff pretending he cannot read the *Superfideas* or the like, refuse to deliver me; I may have this Action against him, *Trin. 37 Eliz. Coo. B. Stringers Case.* And by *Just. Whislock at Glouc. Assises, 6 Car. 13 H. 7. 16. 1 H. 7. 28.* So if the Sheriff himself after he hath Arrested me, and I get and shew Not examination of a Felon.

show him a Legall discharge, as a *Superſedeas* from above, the Plaintiffs releafe, and a power from him to deliver me; he ſhall notwithstanding keep me priſoner ſtill, in this caſe I may have this Action againſt him, *M. 13 Jac. B.B. Wiſhers Caſe. Fins Barre 253.*

Battery and
Affault.
Sect. 13.

If one do wrongfully beat or hurt me, or cauſe me to be hurt by ſetting his dog upon me or the like; I may have this Action againſt him, *Fincheſtry 263.* But for the further opening of this point take theſe following caſes.

Accidents.

1. If one hurt me againſt his will, or by accident, as at a Training, Tilt, Foot-ball, Fence, or other play, by the glance of an Arrow, caſt of a Stone, or the like, I may have this Action againſt him; and yet if the thing done, be done by an unavoidable neceſſity, wherein he that doth it is no waies faulty, as if he run upon my Sword, or Muſket as I am about to diſcharge it, and thereby hurt himſelf, or the like; for theſe things no Action will lie, *Hob. Rep. pl. 176. Broo. Treſp. 178. 294. 10 Ed. 4 6.* So if one be forced to ſtrike me, or thruſt upon me, I may not ſue him that was forced for this, *9 Ed. 4. 37. 21 H. 7. 27.*

Neceſſary un-
avoidable.

Of his own
wrong.

2. If one make but an affault upon me firſt (and what an affault is we have ſhewed before, and ſhall do after) I may then beat him, and juſtifie it, but I may not wound him, and it is not materiall in this caſe whether I be in any eminent danger or not. *Old B. Entries 644.*

In defence of
ones Houſe
and Goods.

3. If one go about to enter into my houſe, or to take away my goods againſt my will, I may in defence thereof gently put him back, and if that will nor do, I may beat him and juſtifie it. So it ſeems if a man have taken my goods, I may preſently retake them, and if he will not deliver them, do as before. But if a man go about to ſtop or turn my water-course, or enter into my cloſe againſt my will, I may not make this reſiſtance. And yet in theſe caſes I may *molliter manus imponere* upon the Treſpaſſor, to keep him off, and juſtifie this, *Guria Paſ. 7 Jac. B.R. Old B. entries, 554. 553, 14 H. 7. Baron Henden at Glouc. Aſſiſes, 17 Car.*

4. A friend alſo may juſtifie the beating of a ſtranger in the defence of the life and perſon of his friend; as a Wife for a Husband,

Husband, a Husband for a Wife, a Father for a Childe, a Child for a Father, a Servant for a Master or Mistresse, but not a Master for a Servant; and in these cases they may disarm him that doth make the assault, till the heat be past, *Broo. Tresp. 37. Old B. Entries 553. 554.*

5. Albeit in these cases the bearing of another is justifiable, yet the wounding, that is, the breaking of the flesh and letting out the blood is not justifiable, *16 Ed. 4. 11. 21 H. 8. 39. 27. Kel. 92. 9 Ed. 4. 28. Broo. Tresp. 37.* Wound, what.

6. Moderate correction may be given to a Rogue according to the Statute, and no Action will lie for this battery. Rogue.

7. A Master may give moderate correction to his Apprentice, Scholar, or Servant, and no Action will lie against the Master for this; but if the correction be excessive, this Action will lie, *Broo. Tresp. 353. 349. Old B. Entries. 555.* Correction of Children, Scholars, &c.

8. If any man arrested upon a Writ, or for Felony, shall not submit to the Arrest, but resist, and there be no other remedy, they that arrest may beat or wound him, and if any others shall go about to prevent the Arrest, or after Arrest to rescue the prisoner, they that make the Arrest may justify the beating of the opposers, *5 H. 7. 5. 4 H. 7. 18. 21 H. 7. 39. 2 Ed. 4. 6. Fitz. Corone 263.* Opposers of Authority.

9. If two be fighting together, any man that stands by may go between them, and do his best to part them, and justify this; but he may not justify the beating or hurting of either of them, unless he do first beat or strike at him, *Per Just. Jones Lent Assises at Glouc. 5 Car.*

10. If a man trouble a Congregation at Divine Service, the Minister or any other for him may as it seems lay hands upon him, and put him out of the Church, and justify it, *Old B. Entries 554.*

If another man do unlawfully set upon me, attempt to beat me, strike at me, though he do not hit me, or hold up his weapon to strike at me being within his reach, thrust or push me, cast stones at me, though he do not hit me, cast drink in my face or upon my clothes, beset my house, tear my clothes, or the like, this is an assault for which I may

Assault, what.
Sec. 14.

Rape.

may have this Action. So if one ravish me being a woman, this is a foul Assault and an Imprisonment also, for which I may be relieved by this Action. But if one offer to take away my hunting-dog from me by force, or strike at me at a great distance, so that he could neither hit me nor put me in fear of being hit or stricken, or if one strike at me, hurl stones at me, or do any such like act as before, merrily or accidentally, and not purposely and seriously, in these cases and for these causes it seems no Action will lie, *Finchesley* 29. 40 *Ed.* 3. 40. *Broo. Tresp.* 336. 236 9 *Ed.* 4. 26. 22 *Aff.* 60. *Old B. Ent.* 552.

Menace and lying in wait.

If one do threaten me to my face or behinde my back, to kill or beat me, or lie in wait and watch to do so, inso much that I dare not follow my businesse as at other times, and I have any speciall losse by this, I may have this Action for my remedy. But if he threaten only to sue me or the like, or if I have no speciall losse by the threatening; no Action will lie for this, 18 *Ed.* 4. 28. 10 *Ed.* 4. 28. 7 *Ed.* 4. 24. 3 *H.* 6. 18. And yet if a man furiously pursue me, that I cannot avoid him, having fled from him as far as I can; I may then threaten to kill him, if he will not depart, and justifie it, *Broo. Tresp.* 28.

Thus we have done with the Trespasses that are done to a mans own person, now we are to speak to the Trespasses that are done to him in that which is his, that is, his Wife, Childe, Servant, Tenant, Ward, House, Land, Goods, or Cattell.

Violence offered to a man in his Wife, Childe, Servant, &c.

If one carry or keep away my Wife from me against my will, I may have this Action, and yet if my Wife be like to be drowned, or be sick, or otherwise in eminent danger, and another take her up and bring her home to my house, or any safe place to succour and preserve her, or if one at her request take her up and carry her from a Fair, to ease her; no Action will lie for either of these things. So it is said if I abuse my Wife and a Friend take her and carry her to sue out a Divorce, or to have a Warrant of the peace against the Husband when there is cause, that for this I may not have this Action, *sed Quere* of this, 21 *H.* 7. 27. 9 *Ed.* 4. 33. *FNB*

91. *Old B. Entries*. 593. 20 H. 7. 2. So if one take or keep away my Ward from me being his Guardian, or my Son and Heir, knowing it to be so, I may have this Action. So if one take away my Son or Daughter; So if one threaten or lie in wait for my Servants to kill or maim them, that they dare not follow their businesse, or maim or hurt my servant that he doth nor can do me the service he did formerly, whereby I have any speciall losse, I may have this Action for remedy against this losse. But if the threatning be only to the my Servants or the like, or whatever it be, if I have no small losse by it, no Action will lie for it, *Old B. Entries*, 552. 20 H. 7. 5. 9 H. 7. 7. *Breo. Tresp.* 388. 609. So if one take or keep away my Servant from me, knowing him to be my Servant. And so likewise it is if one threaten my Tenants at will, so that they depart from my Lands, and I have any speciall losse thereby, I may have relief by this Action. But if my Lessees for life or years be so threatned, no Action will lie by me for this threatning, *Old B. Ent.* 569. 593. 582. 583. So if I be a Goaler and one take away my prisoner from me, or I be a Lord and one take away my Villain from me; or I be a Souldier and have taken a prize in war, and another take it from me, I must have this Action.

If any man enter into, burn, or break my House, pull down or break down my Walls, or break or carry away my Wainscot, Doors, Furnaces or Windows of my House, enter into my Orchard, Garden, Close or Lands, and treade, eat, plow, root up, cut or spoil the Corn, Grasse, Wood, Hedges, or Trees thereon growing, or rob me of the Fruit of my Garden or Orchard, set up pales or a Fold in my Ground, digge or carry away my Land, Coles, Mines or Stones, fill my Ditches; If one dig, root up, break or take away my Poles, Hedges, Gates, Pales, Fences, or if one break, spoil, or take away my Money, Plate, Corn, Grain, Chest, Household-stuff, Wood cut, Weapons, Ship, Boat, Wain, Writings, Bottles, Wool thorn, or the like Goode, or unlawfully Distrain any such thing of mine, or abuse it after it is taken as a Distresse, or suffer his Goods

Wrong done
to a man in his
House or
Lands.

to lie in my Houle or upon my Ground Damage feſant: I one kill, beat, hurt, chaſe or take away my Cattell, Hound, Hawk, Maſtiſ, Pheſants, Partridges, Poppinjays, Thruſhes, or the like, being tamed and uſing my Houſe, pull or ſhear my Sheep, ſtrike my Horſe in travell, and by that means it throw me down, take away Goods waived, or an Eſtray or Felons Goods, belonging to me, or unlawfully Arreſt or Diſtrain my Cattell, or abuſe them being Diſtrained, or ſuffer his Cattell to be upon my Ground Damage feſant. If one kill, hurt, or take away my Deer, or any ſuch like Beaſt, my Cocks, Hens, or my Partridges, or any ſuch like Fowl, whileſt it is tame, and uſing about my Houſe; my young Pidgeons or Hawks out of their neſts or boxes; If one hunt in my free Warren, deſtroy my Fiſh, or diſturb my Fiſhing, hinder me in my Fold of my Cattell, put any thing in the water I uſe for my ſelf or my Cattell to infect it. If one do ſtop Ditches, and thereby or otherwiſe cauſe the water to overflow or run over my Ground, take Wine out of my Bottles, and put water in the room, dig Trenches overthwart the way to hinder my going to my Ground, or let out the water out of my Mill-pond that I cannot grinde, break or cut my Sluces, or the head of my Pond, and let out my Fiſh; or break the head of another Pool, and let ſo much water into my Pond that it doth overflow, and the Fiſh do go out: If any man take away my Tithes being Parſon; In all theſe caſes before and ſuch like caſes, I may have this Action for my remedy.

It is ſaid alſo that for taking exceſſive Toll of me, by a Millard, I may have this Action, and that if one diſturb me in the taking of Toll in a Market or Fair where it is due, I may have this remedy, *Broo. Treſp. 41.* and *FNB Treſpaffe in toto. Broo. Treſp. in toto. Old NB. Treſpaffe in toto. Co. 9. 112.* But for this ſee more afterwards. If a Deſiſee of a Term or Goods, enter into the Lands or take the Goods before the aſſent of the Executor, he may this Action againſt him, *Broo. Treſpaffe 25.*

If I have a Fiſhing or a Warren in another mans Ground, and the Owner of the Ground or another, take, hunt, kill or deſtroy my Fiſh or any Game, I may have this Action for

In reſpect of the caſe, and where this Action will lie for ſuch a thing done or not.
See. 15.

for my relief, 12 H. 8. 3. *Kelm.* 30. If I have Fish in a Trunk or Pond, and a stranger take them away, I may have this Action against him. If I have Hounds, Spaniels, Mastiffs, Greyhounds or such like usefull dogges, and any man take them from me, or hurt them with me, I may have this Action against him, *Hob. Rep. pl.* 363. 12 H. 8. 3. 18 H. 8. 2. And yet if one have a dog that doth use to kill my Conies in my Warren, or a Hawk that doth use to kill my Pidgeons about my Pidgeon-houle, and I kill him; no Action will lie against me for this, *Sr Persvull Willoughbies Case, Broo. Tresp.* 387. *Madhurst Case, M. 2. Jac.*

Matters of pleasure.

If I have a Deer, Hare or Cony, or any such like beast, a Pidgeon, Swan, Hawk, Fesant, Partridge, Parrer, Black-bird, Thrush, Popinjay, or the like bird that is tame and doth use Houle, and any man do take them from me, and hurt them with me, I may have this Action. But if any man take any such creature whilest it is wilde, no Action will lie for this, nor if once they were tame and after become wilde again. If one take away my Hawk in flight, or my Deer out of my Warren whilest I am in hunting of him, I may have this Action, 12 H. 8. 3. 3 H. 6. 5. 18 H. 8. 2. *Broo. Tresp.* 407. 215. *Hob. Rep. pl.* 363.

Wilde Beasts and Birds.

If one come into my Warren or priviledged place, though it be not my Ground, and there hunt, kill or take away my Game of Fish, Beasts or Fowl, or kill my Conies in my own Ground that is no Warren; I may have this Action against him: And if a man spring a Fesant in his own Warren, and it fly into another mans Ground which is no Warren, he may enter the Ground and take the Hawk and Fesant: but if they fly into another mans Warren, there his entry is a Trespasse. But if one kill my wilde Hares or Conies out of my free Warren and out of my Ground, I can have no Action for this, 12 H. 8. 3. *Kelm.* 20. *FNB* 87. 38 *Ed.* 3. 10. *Broo. Tresp.* 111.

If a mans Goods or Cattell be in my House or Ground Damage-fesant, albeit it be against the Owners will, and without his knowledge, yet I may have this Action for the Trespasse, or Distrain them Damage-fesant at my choise,

Damage-fesant.

Kelm. 3. 13 H. 7. 18. Old B. Entries 570, 571. As if a Lessee of my Houſe ſuffer his Goods a longer time then is reaſonable, after his Leaſe is ended, I may diſtrain them, ſome ſay I may alſo bring this Action againſt him : but it is beſt to make an entry firſt, *13 H. 7. 9.* And if the owner of the Cattell enter and take them away before he have tendred amends to me for the Treſpaſſe, this is a ſecond Treſpaſſe for which I may have this Action alſo, *21 H. 7. 27.* If a ſtranger put in his beaſts into the Common where I have common, I may not have this Action againſt him, but I may Diſtrain them *Damage-feſant, Co. 9. 112. 15 H. 7. 13.*

Chafing of
Cattell.

If a man himſelf or with dogs chaſe or hunt my Cattell in mine or another mans Ground, I may have this Action ; and yet the owner of the Ground wherein my Cattell are doing Treſpaſſe, may gently by himſelf or his Dogs chaſe them out, and juſtifie it. But if he doe them hurt thereby, this Action will lie, *Hill. 16. Jac. B.R. Per three Juſtices in Burges Caſe. M. 5. Jac. B.R. Glovers Caſe. Co. 4. in Terringtons Caſe. Broo. Treſp. 421. Co. 8. 67.* And if ones Pigs be in my Ground, I may chaſe them out with a Dog, if I do not hurt them, *Hill. 16 Jac. B.R.*

If a mans Cattell be in anothers ground doing Treſpaſſe, the owner of the ground is not bound to put them in the pound, but may put them out, and if they be thereby loſt he ſhall not anſwer them, *M. 5. Jac. S. Cbr. Hudſons Caſe.*

Goods con-
founded that
cannot be
known.

If a man take my Corn and put to his, ſo that it cannot be diſtinguiſhed which is his and which is mine, and then I carry away all, it ſeems this Action will not lie againſt me for this, *22 Car. at Glouc. Aſſiſes, per Sergeant Wilde.*

Tenant at
will.

If my Tenant at will of my Land do commit any voluntary waſte, as burn the houſes, or the like, I may have this Action againſt him ; But otherwiſe it is of a negligent or permiſſive waſte, *Co. 5, 31. Dyer 171. Lit. Sect. 71. Broo. Treſp. 362.* And if ſuch a Tenant cut under-wood, not timber, at reaſonable times, or having a Mine, dig and tell there, no Action will lie for either of theſe things againſt him, *Broo. Treſp. 327.*

Waſte.

Goods deliver-
ed upon truſt,
or come with-
out taking into
a mans hand.

Regularly where a man hath my Goods by my delivery upon a Truſt, as when I deliver to another my Goods to keep,

keep, or I deliver Goods to a Carrier to carry, or the like; if he convey or keep them from me, or spoil, or sell them, or negligently suffer them to be spoiled, I cannot have this Action for my remedy, but some other Action, *Cook* 5. 14. 2 *H. 7. 11. 16 H. 7. 3.* And yet if my Shepherd willfully destroy my sheep, or my Butler willfully spoil my plate, or I deliver my Cattel to one to plow or compass his Land, and he kill them; in these cases I may have this Action against him; *Coo. 5. 14. 31. 2 H. 7. 11. Broo. Tresp. 343. 327. 295. 72. Lit. Set. 72.* So if another do it by the License of such a person. And by these cases it seems this Action should lie against the Carrier in the first case, *Sed quare.* If I be a Taverner, Mercer, or Draper, and my servant using to sell my Goods give away my Goods, it is said, I may not have this Action nor any other against the taker, but must take my remedy against my servant, *Broo. Tresp. 205. Sed quare* of this. If my Wife convey away my Goods, and I die, my Executor may not have this Action, but must have some other remedy, *M. 8. Jac. Go. B.* If one give me leave to put my corn in his Barn, and I agree that he shall keep the key, and he sell the Corn; it is said I cannot have this Action against him, but some other, By *Serjant Wilde 22 Car. at Glouc. Assises.*

If my Goods happen to be in an Executors hands amongst the Testators Goods unawares of the Executor, no Action of Trespasse will lie against him for this. But after notice given to the Executor, and a Demand of the Goods, and refusal, some other Action will lie, 21 *H. 7. 27. Broo. Tresp. 311.*

We have shewed before that this Action will lie for the owner of a house against him that shall take away or spoil any of the incidents of his house, as Furnaces, Doors, Wainscots, Pale, Grasse, or the like. And for this it is to be known, That all things that are annexed and fastened to a House by Nails, Screws or Pins, or by mortar or stones, as Glasse, Wainscot, Tables, Shelves, Vaults, Furnaces, Doors, Locks and Keys, and the like, are so inseparably incident to the house, that be they put on by whomsoever, they cannot be taken away by the Lessee for life or years before or after

Incidents of a house.

after the end of his Term, but he must subject himself to this Action, but he that hath any estate in Fee-simple or Fee-tail of such a house may pluck it down if he will, and so may a Lessee that holds it for life or years, without impeachment of waste, 21 H. 7. 26. *Coo.* 4. 63. 21 H. 7. 13. See more in *Property, Ch.* 17.

About taking away cattel or goods, and where a man may take his cattel or goods from another man, or not.

Sec. 16.

If a man do voluntarily take away my Gooda or Cattell, and keep them till I pay him money, either without colour or with colour, as under pretence that it is his Harriot, Waif, or Elray, when it is not so, this Action lieth: and if he will not restore them till I pay money or Bond, I shall have a recompence for it all in Damages in this Action, *Broo. Tressp.* 354. *M. 8. Car. B. R. Cannons Case.* So if a man shall any way take away or spoil my Goods. If a man drive my Cattell into another mans Ground, I may go into the Ground and fetch out my Cattell, and yet by this I am a Trespassor to the owner of the Ground, and for this he may bring this Action against me, and I must take my counter-remedy against him that drave them in, *Dodridg in his Treatise.* 21 H. 7. 27. *D. & St.* 34. *Coo.* 1. part 54. But if the owner of the Ground drive my Cattell or carry my Goods without Authority into his Ground, I may (especially in a fresh pursuit) go into his Ground and fetch them out, and for this he can have no Action against me, and yet in this case I may not go into his dwelling house to take my Goods again, nor had the Goods been delivered by me could I have entred into his Close to take them again, 21 H. 6. 39. 9 Ed. 4. 35. *Trin.* 18. *Jac. B. R. Old B. Entries* 561.

part 38.
con.

If one Cattell in drift break away into my Ground, where the Inclosure is good, or into my house the Door being open, the Driver may fetch them out, but I may have this Action for the Entry, being a Trespasse, *Broo. Tressp.* 321. If I be driving Cattell to Pound, and they escape into another Parish, or another mans Ground against my will, and I do presently fetch them out, no Action will lie against me for this, *Broo. Tressp.* 335.

Note.

Wheresoever I may justify the taking of my Cattell, I may justify the taking of their young ones, if they have any,

any, *Broo. Tresp.* 323. If one take away my Goods from me, I may then presently take them from him and justifie it, *Kelm.* 62. *Broo. Tresp.* 185. And if I deliver to one Goods to deliver to me on request, and he deliver them to another, it is said I may take them away from him, 21 *H.* 7. 13. *Broo. Tresp.* 118. 186.

If my dead Goods be in danger of spoiling, as my Corn in the Harvest, and my Neighbour out of his good will doth take it up, or bring it to his own or my Barn; or if he trench my Meadow where need is, and doth mend it, or if a strangers Cattell be in my Corn, and he drive them out; in all these cases, and for these things done without my leave, I may have this Action. And yet if my own Cattell be in my Corn, and another man drive them out, no Action will lie for this. If a house be on fire, I may take any mans Goods out of the house or fire to preserve them, and no Action will lie for this. And if my Horse be fallen in a pit, and in danger, any man may justifie the pulling of him out of the pit, *Kelm.* 88. 2 *H.* 6. 37. 21 *H.* 7. 27. 12 *H.* 8. 2. 15. 8 *Ed.* 4. 35. 13 *H.* 8. 16.

Acts of kindness.

If a Ship be in danger of drowning, the Mariners may cast out the Goods to save men and justifie it. So when a house is on fire the Neighbours may take out the Goods to preserve them, *Daffins Case*, 6 Jac. 21 *H.* 7. 27. If one assault me with a weapon, I may (it seems) take away his weapon and deliver it to a Constable to keep the peace, and justifie it, *N B. Entries*, 651.

For publike good.

It is a rule that no man may enter into my house or ground without my authority or licenle, or authority of Law. And if he doth he is a Trespassor to me, and I may have this Action against him, 12 *H.* 8. 2. But in many cases a man may enter into my House or Close, and be blamelesse. For the opening hereof therefore take these cases.

About entry into, or breaking of another mans house or ground, and where it is lawfull, or not. Sec. 17.

1. If another man have a Horse, Timber, or other Goods in my house or ground, and he enter into it, or see to take it away without my leave, I may have this Action against him, and albeit he had a Lease of the Land a little before, yet if it be now ended this will not help him, 21 *H.* 7. 13. 19 *H.* 7. 9. 14 *H.* 8. 1. 9 *Ed.* 4. 35. And albeit I did command

View or to fetch goods.

R r

my

my servant to deliver the thing to him, yet this will not excuse the Entry, 18 *Ed.4.25*. If I be an Executor I shall have a reasonable time to fetch away my Goods out of the house wherein I may enter and take them. And yet if I be a Lessee of a house for the life of *I.S.* or *I.S.* Lessee for life make me a Lease for years, and *I.S.* die; in these cases if I have Goods in the House, and take them away in convenient time, no Action will lie against me: otherwise it is if I suffer them to stay too long; and the Judges shall set down what time is reasonable, not the Jury, 22 *Ed.4.27.* and per Justice Haughton, 2 *H.6.15.16.*

2. If a man take away my Cattell or Goods, and put them into his ground, I may follow them and take them again; otherwise it is if they were taken away by a stranger, or I deliver them to him, or they be in his dwelling house. See before. And yet it is said, if a man have my Goods in his house, and his door be open, that I may go in and fetch them out, *How's Case, M.9. Jac. B.R. Broo. Tresp. 118. 186. 21 H.7.13.*

Flight to save
life.

3. If a man be assaulted and like to be killed, and he fly through my ground to save his life, I cannot sue him for this, 37 *H.6.37.*

To fetch out
lops of Trees.

4. If a man lop a Tree, and some of the lops unavoidably fall into my ground, and he go into my ground, and fetch them out, I cannot have an Action for this, either for the fall or entry: but the necessity must be unavoidable, else an Action will lie for both, *Broo. Tresp. 310. Hill. 8 Jac. Per Justice Dondridge.* And yet if there be two Tenants in common of a Tree that doth grow between two men, and one of them doth cut and seise it all; in this case the other cannot go into the others house or ground to seise it.

To repair.

5. If one be bound to repair a Bridge which cannot be done without his coming upon my ground to do it; in this case he may do so at a seasonable time without danger of this Action, *Bro. Tresp. 260.* So if one grant me to dig a trench in his ground to leade water to my house, if it be stopped, I may go into his ground to amend it, 13 *H.8.15.9. Ed.4.25.*

Upon a Li-
cense.

6. If I do license *I.S.* to deliver wood to *I.D.* in such a Close,
and

and *I.D.* come into the Close to take it, it seems this is justifiable, *Broo. Tresp.* 242.

7. The Parson may come into my ground being a Parishioner, and shall have a reasonable time to order and fetch his Tithes, *Broo. Tresp.* 345. 345. 49. To take tithes.

8. If I have a Mill, and the water that drives it runs through another mans ground, and something is done there to obstruct my water, in this case I may enter into his ground to see, and if any be, to remove it, and if it be a house I may abate it, and justify it, 9 *Ed.* 4. 35. To remove a Nuisance.

9. If my Tenant when I am coming to distrain, drive his Cattel into another mans ground, or into some other ground of his own held of another man; in these cases I may enter into the ground and take them. To distrain.

10. In case of a common danger, as if water that runs by a Town be stopped, that it may endanger the drowning of the Town, I may go into any mans ground to give it a passage, and if a House be on fire, any man may pull down part of it to save the rest; or pull down it, or perhaps other houses to prevent the burning of many others. So in case of Enemies, Souldiers may justify the making of Bulwarks. So Fishers may justify the going into any mans ground to amend or dry their nets. So men may go into any mans ground to hunt or kill Foxes, Otters, Graies, and the like Vermin, and all this without the License of the owner, *Dyer* 36. 12 *H.* 8. 2. *Broo. Tresp.* 40. 21 *H.* 7. 27. 13 *H.* 8. 16. 8 *Ed.* 4. 35. 18. But a man may not do so to kill Hares. Also to keep the peace and prevent mischief, any man may enter into anothers Ground, or (as it seems) his house either. So also to apprehend Felons, any man may enter into another mans Ground or House, and break the House also if need be, Also a man may turn his Plow upon his Neighbours Land in the Field, if it cannot be avoided in plowing, *Broo. Tresp.* 354. 527. So to make a perambulation, the Minister and Parishioners may after their usuall manner go into mens grounds, *N.B. Entries* 652. *Old B. Entries* 558. See more after where this Action will lie against an Officer. To prevent a common mischief, and for publike good.

11. If a mans Horse or Beast be like to be drowned, I may

To save men or cattell in danger.

may go into any mans ground to save him, and if he be like to be killed, I may go into his house to preserve him, 12 H.8.2. 13 H.8.5. And yet if I go into another mans ground to save his horse from stealing, or his Tithes from being spoiled by weather or pigs, he may have this Action against me, 21 H.7.27. 9 Ed.4.35.

12. If one be unlawfully imprisoned in my house, and he break the house, and get out, I cannot have this Action against him, 9 Ed.4.35. 21 H.7.37.

To look for
stolen goods.

13. If one have sheep stolen, he may go into any mans ground where he doth suspect the sheep are, to see the sheep whether they be his or not, *Per Justice Berkley M.8. Car.*

14. If the Sheriff have a Replevin against my Goods, the Plaintiff may come with him into my close to shew him my Goods, 3 H.6.37.

To see a mans
goods.

15. If I have Cloth in a Taylor or Sheremans shop, and the door be open, I may go in to see it, *Hows Case, M.9. Jac.B.R.*

To pay money.

16. If I make a Lease of my dwelling-house, rendring Rent, or one is bound to pay me money on an Obligation in my dwelling-house: in this case he may come into my house to do it when I am there to tender. But if it be to be done in another mans house, *Contra, Plow. 71. 18 Ed.4.25. 9 Ed.4.25.*

To take his
way, Common
&c.

17. If I or the Common-wealth have a way through anothers ground, or title of Common there, or cause to distrain there; in these cases I may come into the ground to use or do it, and no Action will lie against me for this in any of the cases before, *M.7. Jac.B.R. Old B. of Entries, 559, 560.* And yet if I be besides the way, or take more common then my due, this Action will lie for this exceeding.

18. If a man have businessse with me to shew me a deed for preventing a difference, or the like, and I being in my house or ground, he come in to speak of the matter; It is said this is not actionable, *Broo. Tresp. 23. Sed quare*, for if he do it without licence or invitation, it seems to me Actionable.

19. In many other cases the Law gives power to enter into House or Land, as Travellers or others may go into a common

common Inne or Hostry, a man may distrain for his Rent or Damage-fesant, a man that hath right to an estray may seise him, a man that hath a Reversion of Land may go into it to view it, a man that hath power to sell Land, hath power to view it and value it; A Commoner may go on the Common to see his Cattell; the Kings Purveyor might have taken up cattell for the King, and no Action will lie against these men for any of these things.

But in all these and such like cases where a man may justify his entry into another mans house or ground for some speciall purpose, he must see he do not abuse his power there. And therefore in all the cases before of power given to enter into Lands, if he shall break the hedges, leave open the gates, or otherwise abuse his power, he shall be punished as a Trespassor from the beginning. And in the last cases if a Traveller or other shall stay in the Inne over long, break or take away any of the household-goods, break the windows of the Inne, or the like, or the party distraining in the next case shall work, kill, or otherwise abuse the distresse, or in the next case he shall hurt, sell, or kill the Estray, or in the next case if he in Reversion shall break the house to come in, or being come in at the doors stay all night, cut down trees, or the like; or the Commoner shall cut the Trees, or dig the ground, or the Purveyor sell the Cattell or Goods taken up; in all these and thelike cases before, the Law doth reckon all that is done unlawfull, and the party grieved may have this Action for his relief.

And yet if one enter into an Inne, and do not pay for his victuals he calleth for, or being distrained, and he offer the Rent for which he was distrained, and the Distrainer will not deliver the distresse; in these cases, and for these causes the offender is not reputed a Trespassor *ab initio*, but in that thing only.

And in the first case the Inne-keeper shall have an Action of Debt, or on the Case, for his money; in the latter an Action of Trespasse, or Trespasse on the case for his relief, *Co. 8. 146. 5. 76. D. & St. 112. Dyer 36. 134. 5 H. 7. 11, 16 H. 7. 14. 21. H. 7. 22. 9 H. 6. 29. 11 H. 4. 75.*

In like manner it is of an Authority given by one man to another, if he to whom it is given exceed and abuse it, as I give one leave to enter into my House or Close, and he break the House, or cut down Trees, or I give one power to take one, and he take two of my Horses; or I give one power to ride my Horse to *Dover*, and he ride him further, in these and such like cases he is a Trespasser only in the excess. And if there be violence, or colour of violence in the Act, it is punishable by this Action. But if the injury be rather in matter of fraud, it is punishable by an Action of the Case. *Broo. Tresp.* 327. 295. 72. And in all these and such like cases before set forth, the Action may be avoided by setting forth the matter in a special plea.

Action of the case.

By inevitable necessity or accident.

If one do me a Trespass against his will; as if his Cattell come unawares into my Ground, yet I may have this Action against him; and yet if my dog of his own accord without any provocation of mine, kill or chase a mans cattle, I shall not be charged with this, unless it be sheep, and the dog have been used to chase and kill them, and I have had notice of it, *Dyer* 29.

By Cattel in Corn.

If all the neighbours in a Village take their Corn out of the field, and one perverse fellow leave his corn there of purpose, and the neighbours put their Cattell in the field, and the cattell eat his Corn, he may not have this Action for this, *Broo. Tresp.* 352.

By the fall of Lops.

If a man lop a Tree, and some of the lops by chance and against his will that doth lop, fall into my ground, or on my hedge, and he fetch it out again presently, yet in this case and for this I may have this Action for one and other. But if there be an inevitable necessity, or it fall out by the Act of God only, or by a strange winde, or the like, no Action will lie for this, *Broo. Tresp.* 310. 10 *Ed.* 4. 2. 20 *Ed.* 4. 6. 37.

To catch a bit in passing on the way.

If one have a way through my Ground where no inclosure is, and he drive his Cattell there; or through the Corn-field, where the way is, and they catch a bit as they go against the drivers will, being as carefull as he can, no Action will lie for this: But if the driver bait, or keep the cattel there, I may have this Action against him or the owner of the cattell, *Broo. Tresp.* 331. 351.

If my Cattell be with another bodies so together that I cannot part them, and I drive them to a convenient place to shift and part them. No Action will lie against me for this, *To part Cat-*
Broo. Tresp. 354.327. tel.

If a man in Earing be necessitated to turn his Plow upon my Land according to the fashion of the countrey, and the Sallow hap thereby to turn up some of my Land, or the Cattel hap to catch a bit of my Grasse or Corn on my Land, no Action will lie for this, *To plow Land*
Broo. Tresp. 354.327.

If an Infant make a Feoffment, and make a Letter of Attorney to give Livery of seisin, and the Attorney doe enter, he is a Trespassor, and for this the Infant may have this Action. But if the Infant give Livery of seisin with his own hands, he cannot then have this Action against the Feoffee. Upon an Estate made by an Infant, Feme-covert, &c.
So if he sell Goods, and the vendee take them without his delivery, by this he is a Trespassor: But if the Infant deliver the goods with his own hand to the vendee, *Contra. Broo. Tresp. 16.338. Perk. Sect. 16; 17.*

If an Infant, feme-covert, or man *per duresse* grant a Rent-charge out of his land, and the grantee by colour thereof distrain upon the Land, the cattell of the Infant, husband that hath in right of his wife, or him that granted by *duresse*, in all these cases this Action lieth against him that distraineth, 21 H. 7.39. *Broo. Tresp. 151.*

If a man have an ancient ditch in my ground, and he come at seasonable times to skowr it, and doth skowr it, keeping the old breadth, I cannot bring an Action against him for this, *To skowr a Ditch.*
Per Baron Henden at Glouc. Assises. 17 Car.

If a man give me leave to set a Rick of hay in his ground till I can conveniently sell it, and after two years time he makes a Lease of the ground to another, and he turns in his cattel, and doth eat up my hay; in this case I can have no Action against him, for by making the Lease it seems the License is determined, Trespasse punishable. In Hay.
Hill. 17. Jac. B.R. Sir William Webs Case.

The Parson shall have a reasonable time to prepare and fetch his Tische on my Land. But if he leave it on my Land any long time after my corn is gone, and my cattell spoil it, he hath no remedy, 12 Ed. 4.6. If a new Gate be set up in the High-way where
In Tythe.
In Gates.
Nuisance.

where none was before, and I being a Traveller break it to peeces; this is justifiable, and no Action will lie against me for this, *Adj. Judg. Cur. B. R. James and Haywoods Case.* So for any other Nuisance.

The owner-
ship and pos-
session of the
thing wherein
the Trespasse
is done.
Sect. 18.

A man that will maintain this Action for any wrong done to, or in his Lands or Goods, must have a good ownership and property, or at the least a good and lawfull possession in the thing wherein the Trespasse is supposed to be done. And for this take these things.

1. A man may gain a property into Goods two waies,
1. Either by Act of the party, as by Gift, Sale, Legacy, and the like: Or by Act of Law, as by Waiving, Straying, Shipwrack, Forfeiture, Executorialship, Administration, Trespasse, and Recovery of damage, Stealing and open sale, by Tenure, Custome, as Harriot, and the like, *Just. Dodridg. 2. part. F. 72. &c.*

2. A Lessee for years after his Lease is ended, may have this Action for a Trespasse done upon the Land before the Lease was ended, *Plow. 431. Broo. 456.*

3. Any man that hath but a bare possession of, and no Title to Land, may have this Action against him that hath no right. *Plow. 431. 546. Broo. 456. Coe. 5. 85.*

4. No man can have this Action for a Trespasse done upon his Land untill he be possessed of the same by entry. And therefore if Land descend to an heir, or a Lease be made to begin at *Michaelmas*, or one hath a title of entry for a condition broken, or the like, and a Trespasse is done upon the Land before the entry of the heir in the first, the Lessee in the second, or him that hath title to enter in the third case, in these cases the party grieved may not have this Action, *11 H. 7. 22. Plow. 142. 22 Ed. 4. 37.*

5. If Lessee *pur autre vie* or Lessee for years keep himself in possession of the Land after the term and estate ended, the party that is to have the Land cannot maintain this Action till he have made his actual entry, and then only for the Trespasse done after, and not before his entry, *Plow. 133. 136. Bro. Tresf. 365. Coe. 1. 57. 11 H. 7. 22.*

6. If an office finds Land in a Subjects hands to escheat, he

he that is in possession of the Land cannot afterwards bring this Action for Trespasse done in the Land, *Plow.* 489. 19 *Ed.* 4. 2.

7. If one give or sell me Goods, and before I get the possession of them another man doth take them away or hurt them; in this case I may have this Action for my remedy, *Bro. Tresp.* 303.

8. If I borrow a Horse to ride a journey, and the owner or a stranger take away the Horse from me before I have done my journey, it seems I may have this Action: and albeit I abuse him, or ride him out of the way, yet he cannot take him from me till I have done my journey: *Lees Case.*

9. A man may have this Action for a Trespasse done in Goods wherein he hath only a possession and no property. And therefore it is no good plea to this Action, that the Goods be the Goods of a stranger and not of the Plaintiff. *4 Ed.* 4. 75. 3 *H.* 6. 32.

If a man cut or carry away my Trees, I may have this Action against him. And for this take these things.

By cutting off,
or taking away
Trees.

1. If a Tenant in tail sell his Trees growing upon the Land, and die before they be cut, in this case the vendee may not cut and take them away, but he will be liable to this Action by the heir or by him in Reversion. But otherwise it is of Trees sold by Tenant in Fee-simple, *Perk. Sess.* 58, 59.

2. If I grant to another Estovers in my wood, by the view and delivery of the Bailly, and he take them without leave of the Bailly. Or if he have power to take in my wood to any use without asking, and he take more then he doth put to that use; I may have this Action, *Broo. Tresp.* 327. And yet if he cut it before he do use it, to the end it may be more seasonable and fit for use, no Action will lie for this: *10 Ed.* 4. 3.

3. If I be a Lessee for life or years of land, and a stranger cut down Timber, or do any other waste, I may bring this Action against him, and shall recover treble damages, because I must be charged so much in the Action of waste against me.

4. If one sell me all his Trees in such a Close, and after
S f he

he cut them down himself, and then I fetch them away, no Action will lie for this, *Dyer* 305. So if after this sale he selleth his Close to another, and I do then cut and carry away the trees, I may justify it. *Breo. Tresp* 400.

5. If I sell a Wood except 40 Oaks to be taken away by me in two years, and I do not cut them within the time, and then he do cut all, and do not leave me 40 Oaks, in this case I am without remedy, *Breo. Tresp* 50. 399.

Waste.

6. If my Lessee for life or years do a waste in the Lands Leased, I may not have this Action, but must have remedy by an Action of waste. And yet if I make a Lease for life or years of a Close excepting the Trees, and the Lessee or a stranger do Trespass in the Trees, Accorn or Fruit thereof, which in this case I am also to have; for this, this Action and not an Action of waste lieth, *Co. 5. St Thomas Palmers Case*. See more in Property, *Ch* 17.

By cutting,
taking away
of Corn or
Grasse.

If a man cut or carry away my Emblements, that is, my corn or grasse, I may have this Action against him. But for the further knowledge hereof take these things.

Executor.

1. If a Tenant in Fee simple, Fee-tail, for life, or at will, sow his Land, and die before he reap it, his Executor shall reap it; So whereever an Estate dependeth on a life. If a Lease be made for life, the remainder in Fee, and the Lessee for life make a Lease for years, the Lessee for years sow the Land, and after the Lessee for life die; in this case the Lessee Executor, not he in remainder, shall have the Corn, *Co. 5. 85*. So if Tenant in Dower sow her Land and die, her Executor shall reap it, *Stat. 20 H. 3. chap. 2. Perk. 522*. But if she sow her Land, and then take a Husband, and he die before it be cut; in this case she, not her husbands Executor, shall have it, *Breo. Emblements 26. Co. 5. 116. Co. upon Lis. 55*. And if the Lessor of a Tenant at will determining the will himself after the Corn is sowed, the Tenant at will, not the Lessor shall have the Corn, *Co. upon Lis. 55*. But if the Tenant at will himself determine the will, *contra*. And if such a Tenant after he is discharged shall enter again, and then sow the Land, in this case the Lord, and not the Tenant, shall have it, *Co. 5. 116. Dyer 173*. And if any Tenant do only ear and dung the Land,

Husband and
Wife.

Land, and it be not sowed before his death, he loseth the Corn, *Lit. ch. 68. Co. 5. 116. Perk. ch. 512. 37 H. 6. 25.* And albeit the Corn be cut, yet he that hath right to it shall have it.

2. If a Tenant for years in certain, who knoweth the end of his Term, sow the Land, and his Term end before the corn be ripe and cut, he that hath right to the Land, not the Tenant, shall have the Corn, *Lit. Ch. 68. Co. upon it.*

3. If a man under colour of a Lease or other conveyance, supposing him to be good, when he is not, doth sow the Land, not the owner nor his Executor if he die, but he that hath right to the Land, if he shall enter, must have the corn, *Leas Case 9 Jac.*

4. If two be Tenants in common and one die, and his Wife hold in common, and sow the Land and die, in this case neither the other Tenant in common, nor the Heir, but the Executor of the woman shall have the Corn, *Perk. Chap. 523.*

5. If a Parson die before the Corn is reaped, when the Glebe-land is sowed, and another Parson made; in this case not the Successor but the Executors or Administrators of the first Parson dead, shall have the Corn. But the Tithes screwing during the vacation must go all to the Successor, *21 H. 6. 30 34 H. 6. 33. St. 28. H. 11.*

6. If a Disseisor, or a Disseisor of a Disseisor, or a Feoffee, Donee or Lessee of the first or second Disseisor, sow the Land, and cut and carry away the Corn, or cut and carry away the Grass or Trees; or gather and carry away the Fruits, Apples, Nuts, &c. or give or sell either the one or the other; in these cases after the regresse of the Disseisee, the property of it all is in him, and he may take it wherever he finde it: And if he die his Executor shall have it; and so it seems is the Law for Flax or Hemp, or any other annuall profit; and if it be gone he shall recover Damages in Trespasse, *Co. Inst. 1. part. 55. 11. 51. Dyer 31. Perk. ch. 519. Co. 5. 85.*

7. If one be seised of Land in the right of his Wife in Fee or for life, and he sow the Land, or he make a Lease for years, and the Lessee sow the Land, and after before the end of the

Executors.

term the Husband or Wife die, his Executors, or the Lessee, or his Executors, shall have the Emblements, 7 H. 4. 17. So if a joint-estate be made to the Husband and Wife, and the Husband sow the Land and die, his Executor shall have it, *Coo. 1. part. 55. Dyer 316.* If Land be leased to a Husband and Wife at will, and after they be divorced *Causa pracontractum*, and the Land be sowed before the Divorce; in this case the Husband, not the Lord, shall have the Corn, *Coo. 5. 116.* If the Wife of a Copy-holder that holdeth *Durante viduitate*, according to the custome sow the Land, or make a Lease, and the Lessee sow the Land, and before it be cut she take a Husband; in this case the Lord or his Executors, not the Husband shall have the Corn, *Coo. 5. 116.*

8. If one seised of Land in Fee have issue a daughter, and die, his Wife being privily with childe of a sonne, and the daughter soweth, and after the son is born, the daughter in this case shall reap it, though the son enter before the corn be ripe, *Coo. 1. p. 55.*

9. If a Tenant by Statute sow the Land, and after some extraordinary encrease happeneth that he is satisfied; in this case the Tenant shall notwithstanding reap it, *Coo. 1. par. 55.*

10. If the Estate of the Tenant, though uncertain, be upon a defeasible Title by a right paramount, or if the estate of the Tenant determine by his Act, he that hath right or entred, not the Tenant, shall have the Corn. And therefore if one enter upon Land on a Condition in Deed, or a Condition in Law, as if Lessee for life or years of Land, alien it in Fee, or do waste; or if a Feoffment or Lease be made on Condition, and the Condition be broken: or the Lord of a Copy-holder enter for a Forfeiture on his Tenant. So where one commits Felony and forfeit, and an Entry is made for the Common-wealth; in all these cases the Feoffor, Lessor, Lord, or Keepers of the Liberties shall have all the Emblements that are growing, and not cut upon the Land at the time of his entry upon, or recovery of the Land. But if it be cut and so severed from the Land before the entry, *contra.* So whereever one doth recover Land in an Action, he shall have the Corn upon it,

it, *Coo. 5. 115. 4. 21. Perk. Sect. 515. Coo. upon Lis. 55. 5. H. 7. 16. See more in Property, ch. 17.*

And in all or most of these cases where any man doth cut or take away the Emblements that doth belong to me; I may have this remedy by this Action of Trespasse.

This Action will lie against a Sheriff his Bailiffs or under-Officers, or any other such like Officers. But for the further opening of this point, take these cases following.

Against an Officer.

Sect. 19.

For mistaking the Goods.

1. If a Sheriff have a Writ against the Lands or Goods of another man, and he mistake and execute it upon my Lands or Goods; as if he take my horse under my servant in a suit against him; or relieve my Goods for another mans, I may have this Action against him. And it will not excuse the Officer in this case to say, that the Plaintiff in the suit, or any other man did affirm, that the Lands or Goods were the Lands or Goods of the Defendant, *Dyer 295. Kelm. 129. 119. D. & St. 149. 150.*

2. If another mans Lands or Goods be leased or pledged to me, and the Sheriff take them as his Lands or Goods, I may have this Action against the Sheriff, *Broo. Tresp. 364.*

For breaking my House.

3. If the Sheriff or any of his Officers having Proccesse against my Land or Goods, exceed his Authority, as upon a common Proccesse, *Capias ad Respondendum, Latitat*, or the like Proccesse, or a *Capias ad satisfaciendum, Fieri facias*, or the like Execution against me; if in the Executing of these Writs he break open my House, Doors or Chests, which is more then he can justifie, for he may not (as it seems) in this case do more then come in when the Door is open, and cannot pull the latch or open it; in these cases I may have this Action against him, *Coo. 5. 93. 8 Ed. 4. 4. 18 Ed. 4. 41. Hob. Rep. pl. 62.*

Where one may break a House.

4. If upon such a Writ, Proccesse or Warrant against my Lands or Goods in executing whereof or otherwise, where an Officer may break my house, as upon an *Habere facias Seisnam*, or *Possessionem*, or *Capias ut legatum*, or to apprehend Felons or Adulterers, or to search for stolen Goods, or upon a *Capias ad satisfaciendum*, to take another man in my house; in these and such like cases, if he break open my House or Doors before he hath first demanded the opening

ante 268.

opening of the Doors, I may have this Action against him, 1 H. 7.6. 13 Ed.4.9. Coe.5.90.63. Broo. Tress. 248.

5. If in all these and such like cases the Officer do but his duty, no Action will lie against him; and therefore if the Officers of the County-court within their jurisdiction, attach mens Goods by Warrant of the Court, and take them with them, or leave them with the owners, or others in their places do according to their duties, they may justify it, 9 H.7.6.

6. If one inform a Constable that *A.* hath robbed *B.* and he doth thereupon enter into the house of *A.* to search for the Goods stolen, and in truth no Robbery is done; in this case the Lord-Keeper held, That this Action will lie against the Constable; but the two chief Justices held the contrary, *Hill. 3 Inst. in the Star-Chamber.*

7. If a man have taken my Goods, and impounded them in his own Close, and a Replevin come, and the owner of the ground resist it, if then the Officer break the Close & do it, this is not Actionable, 21 H.7.27. 4 Ed.4.34.

8. If an Officer do any such act as belongs to his Office without the precinct of his command, as a Constable without his Parish, regularly by this he is a Trespasser, and this is actionable; and yet if an Officer attach my Goods within his Jurisdiction, and I rescue them, and carry them without his Precinct; in this case it seems upon a fresh pursuit, I may go after them, and take them, *Broo. Tress. 23.*

About a Distress.

If one distrain my Cattell or Goods without any cause or colour, or for a Debt on a Bond, or a Fine, or Amercement in a Court-Leet that is not legally set, or any such like cause that is not good or just. Or if a man having distrained my Goods, will not tell me requiring it, and offering to give satisfaction, for what cause he distrained, or if having cause to distrain, he do distrain beasts not distrainable, as beasts of the Plough, or sheep of the Fold. Or if having distrained beasts distrainable, he abuse them, as if being a Horse or Oxe he work it, or being unruly he fetter it, or tie it to the Pound, so as it be thereby hurt, or if he put the distresse in an unknown place that I cannot tell how to relieve it. Or if he take them out of one County and put

put them in a Pound in another County; or if he distrain them in the High way, or a place not distrainable; in all these cases I may have this Action, *Co. 8. 147. D. & St. 112. FNB 47. 48.* And yet it is said, If a Lord distrain upon his very Tenant without any just cause, that he may not have this Action for this wrong. And it is said, If the Lord distrain for Rent, and the Tenant offer the Rent, that no Action but Detinere lieth, *Broo. Tresp. 29 H. 7. 11. Broo. Tresp. 344. 220.* If my servant take a Distresse for me, and the owner of the Cattell desire me to deliver them, and if he pay not the money by a day, that he shall have them again; in this case it is said, if he pay not the money, that my man may take them again, *Broo. Tresp. 29.* If I be about to distrain for a Rent, and the Tenant seeing me coming to distrain, drive his Cattell into another mans Ground, not held of me, and I distrain them there, no Action will lie against me for this, *Old B. Ent. 570.* If a Distresse be taken from me after I have distrained, I cannot for this have this Action, but I may have a Rescous, *M. 7. Jac. Co. B.*

There are divers things to be pleaded in avoidance of this Action. There is the generall Plea which is Not guilty, and there are divers speciall Pleas. And the speciall Pleas are some of them of one nature, and some of another, for some of them found in a way of justification, when the matter doth contain a good reason to maintain the lawfullnes of that he did, for which he is now questioned: some of them found in a way of excuse only, and will free a man from any punishment for the thing so done at that time. And some of them found in acquittal of a man altogether, and contain so much, that he is not guilty at all. And some of them in discharge of him of the Action where-to he was once chargeable and liable. And the Defendant must be very carefull, for if he have matter of justification or excuse to pleade, he must be sure to pleade it specially; for in those cases if he pleade Not guilty, it will be found against him, *Co. 5. 85. upon Lit. 282, 283.*

Speciall Pleas by way of justification, are such as set forth some speciall thing by which he doth justify the thing he doth with another mans Lands or Goods; as that he did it

What shall be said to be a good plea in bar, and avoidance of this Action, or not. Sec. 20.

Matter of justification. Sec. 21.

it by Authority. And this may be given either by the Law, or by the party; Wherein to make it good, there must be two things; 1. A good authority. 2. It must be well pursued.

In Trespasse for Entry into Land, it is a good Plea to make a good Title to the Land or Common in it, and so for Goods, *N B ent. in tot. O B ent. 566. 567. 565. 590. 580.*

For Assault.

It is a good Plea to a Trespasse for an Assault and Battery, to say that the Plaintiff began, &c. *N B. of Entries, 644.* And to this Action for Imprisonment, Assault or Battery, That he did it by necessity, in an Arrest to enforce obedience, or the like, *Old B. of Entries, 599. 598. 560.* It is a good Plea in Trespasse for taking a horse, to say, he borrowed it for a time, or a purpose, which is not yet out or done, *Broo. Tresp. 337.* In Trespasse for cutting Trees, it is a good Plea, That the Plaintiff hired him to do it, *Broo. Tresp. 383.* In Trespasse for taking of Goods, it is a good Plea to say, That the Plaintiff let them in the Defendants house, and after there was an agreement between them that he should keep them till the Plaintiff had paid him x^{lb}, which he hath not paid him, *21 H. 7. 13.* But it is no good Plea to say, That the Goods were the Goods of a stranger, and not the Goods of the Plaintiff, *4 Ed. 4. 75. 3 H. 6. 32.* In Trespasse for entry into a house, it is a good Plea to say, he entred to apprehend a Felon, and took his Goods that were there, *Old B. of Entries, 580.* In Trespasse for taking of Goods, it is a good plea to say, he did it by Warrant, as Bailiff of a Court-Lect for a forfeiture, &c. *N B of Entries, 665.* or he distrained for Rent or Service, *Old B of Entries 604. 605. 603.* That he distrained for Subsidie, Fifteens, or the like, *Old B of entries 601.* So, that he took them by vertue of any Process out of a Court enabled with power to make out such Process, *Old B. of entries 598. 599. 600.* That he took the Goods for Hariot, Waif, Estray, Wreck, or the like, *Old B of Entries in tot. 584.* Or that he distrained them for pownage, or the like; or for levying of Expences for Knights of the Parliament, or the like, *Old B. ent. 599.*

His Free-hold.

In Trespasse for Entry into Land, it is a good Plea to say, That it was his Free-hold, or the Free-hold of another from whom he had Authority to do what he did, *Broo. chap.*

47.23. *New B. of entries* 645.582. So if it be for putting in of Cattell, it is a good Plea to shew he hath right of Common there, and under colour thereof he put in his Cattell; *Broo. Tresp.* 30.

If one have Corn upon anothers Land, and he take it, and the Owner of the Land sue him, he must justifie, and may not plead Not guilty, *Coo.* 5.85.

In Trespafs for taking Cattell, it is a good barre to set forth a good sale to the Defendant, and that he thereby took them, *Broo. Tresp.* 328. For cutting Trees, it is a good plea to say that the Plaintiff gave them to the Defendant, *Broo. Tresp.* 42.

There are divers other Pleas that enure by way of barre, as a Judgement had, and Damages recovered against the Defendant for the same Trespafs, in another Action of the same or another nature, *Fitz. Corona* 110. And if an Action be brought against a man for a Trespafs by Assault and Battery done by him, it is a good plea to say it was done by him and another, and the Plaintiff hath recovered Damages of the other. But if the beasts of *A* and *B* come together in my Ground; in this case I may recover severally, and this plea will not hold, *Hil.* 18 Jac. B. R. *Hunneyes Case*.

Arbitrement may be also pleaded in barre of this Action.

Arbitrement
Accord.

Also Accord with satisfaction may be pleaded in barre of this Action. For the clearing whereof take these things, 1 The thing given and received must be valuable and satisfactory, a charge to the giver, and a benefit to the Receiver. And therefore if one plead, that whereas there were divers Trespasles committed by each of them, one upon another, and by meditation of friends they agreed one should go quit against the other, this is no plea, neither will it barre in the suit. So in an entry on the Statute of *Rich.* That the Plaintiff shall re-enter and have his Land in peace, and that he shall deliver in the Writings that he hath that do concern the Land, *Dyer* 356. 16 Ed. 4.8. 9 Ed. 4. 19. *Fitz. Accord.* 3. 4. So if it be in Trespafs for Goods taken, and the Defendant plead an Accord made that he should have his Goods again, 9 Ed. 4. 19. 30 H. 6. 4. So if it be that the Defendant should do his endeavour to make the Plaintiff and another (who was at odds with him)

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agreed

agreed, or (as it seems) to shew that he did make an Accord between him and the stranger, unless he shew withall that he is at some charge to do it. And yet if the Defendant give the Plaintiff a pottle of Wine in satisfaction of the Trespass, and he agree to it, this is a good Accord, and a barre in the Action, *Fitz. Accord. 1. 19 H. 6. 29. Fitz. barre 26.* 2 It must be perfectly and compleatly finished and executed, and satisfaction made according to the agreement before any Action brought: and therefore if the Defendant plead an Accord that he must make Windows, and pay 10^l a day to come, and he set forth that he hath made the Windows, but he hath not set forth he hath paid the 10^l, this is no barre, *17 Ed. 4. 2. 16 H. 7. 10.* In Trespass the Defendant pleaded an Accord to pay 6^d to the Plaintiff, and to give him counsell when he shall require it; this is no good Plea, *17 Ed. 4. 2. Old N. B. f. 122.* Tender of money without payment is no good Plea in barre of this Action. 3 It must be in the life time of him that did the wrong; and therefore if the Accord be between the parties, and be executed by the Heir or Executor of the Trespassor, this is no barre where this Action may lie against the Executor, *Dyer 356.* 4 The party to whom the wrong is done must accept the amends according to the agreement, for it seems notwithstanding the Accord, he may refuse it; and tender of amends without an acceptance thereof, is no Plea to this Action, but being accepted, is. For as wrongs and injuries cause discord and variance, and beget Suits, so by an Accord between the parties this may be recompensed, and this recompence begetteth peace, *Co. 9. 79. 5 Ed. 4. 7. Dyer 356.* 5 If divers do a Trespass, and one makes a good Accord, this will discharge and be a barre to all the rest, *Co. 9. 79.* 6 If a stranger, as one of the Parents or Friends of the Trespassor, give the amends in recompence; it seems this is as good as if the party himself did give it. In Detinue for a Chest and Charters therein by the delivery of the Plaintiff, the Defendant plead an Accord, that he should keep the Chest untill the Plaintiff come to *Bristow*, and there it shall be opened, and if any Deeds be there that do concern a House of

of which the Plaintiff had encoffed the Defendant, that he shall keep it still, and saith that he never came to *Brisfow*; and it was awarded a good concord. But *quare Fitz. Barr.* 166. *Accord.* 2. 7 *Ed.* 4. 23. 7 If one be amerced for a private Nufance or Trespafs done to the Lord in his Leet, and he receive the Amercement, though it be Extortion, and he could not have recovered it; yet it seems if he after bring an Action for this Nufance, this acceptance of the Amercement may be pleaded in barre, *Fitz. Barr.* 187. 223. *Broo. Tresp.* 195. 61. 66. 8 In a Writ of false imprisonment, the Defendant saith it was agreed between the Plaintiff and him, that he should bring the Defendant to such a place, which is the same imprisonment, and it seems this was no good Plea, *Fitz. Barr.* 14.

That the Plaintiff hath a Replevin depending in another Court for the same Trespafs, is a good Plea, *Broo. Tresp.* 357. But it is not a good Plea that he hath been indicted for the same thing, and paid a Fine to the King. And yet that he hath been indicted, arraigned and acquitted, is said to be a good Plea, *sed quare*. So, that he hath been (being a Tenane) amerced for the Trespafs at the Lords Court already, and paid the Amercement, is said to be a good Plea, *Coo.* 4. 43. 9 *H.* 6. 50. *Broo. Tresp.* 405. 17 *Ed.* 4. 8. But I doubt this case.

If it be for Cattell Damage-fesant in his ground, it is a good Plea to say the Plaintiff did drive the Cattell into his ground, *Broo. Tresp.* 148. *Kelm.* 30.

A License may be pleaded in avoidance of this Action, as if it be for an entry into House or Lands, taking of goods or the like, he may plead a License so to do from the Owner, as that he invited me into his house, gave me leave to go through his Close, &c. *Broo. Tresp.* 533. *Coo.* upon *Litt.* 368. But then there must be these things in the case, 1 A good License, for if a Tenant at will shall license me to cut down Trees upon the Land, or a Shepherd that hath sheep to keep shall license me to kill them; this will not excuse me in a suit for this, *Broo. Tresp.* 295. 2 This License must be pursued, 11 *H.* 7. 21. *Old. B. entries* 596, 597, 505. *Broo. Tresp.* 194. 19 *H.* 6. 65.

Matter of excuse and discharge.

Sec. 12. |
License.

To an Action for a Battery, it is a good Plea to say that he did it of his own wrong, that is, that the Plaintiff did begin the Affray first, &c. 34 H.6.16. 41 Aff. pl. 21. *Books of Entries in toto.*

If the Action be for suffering a mans Goods to lie in his house Damage-fesant, it is a good excuse for the Defendant to say that he was Tenant to a Lessee for life, that lived farre from him, that he could not hear of his death in a long time after he was dead, and therefore the Goods were not removed so quickly. In Trespafs for a hurt, it is a good Plea to say that the Plaintiff and Defendant agreed to run at Tilt, Barriers, or to play at Back-sword, Foor-ball, or the like, and by that means the hurt came, *Fitz. Barr. 244.* In Trespafs for Damage by Cattell, it is a good Plea to say that the mounds of the close adjacent were the Plaintiffs, and for lack of repair thereof they came into the Plaintiffs Ground, *Old N.B. 561, 562, 563.* But if the Beasts were turned in, the Plaintiff may shew it by his Reply, *Old N.B. 503. 563.*

It is a good Plea to shew a Pardon by Act of Parliament, *Old B. Entries 596.* In an Action for Toll, it is a good Plea to say, Time out of minde such men have been discharged and ought to be discharged of Toll in Fairs or for passages, &c. *Old B. of Entries 605.*

In Trespafs for beating a Servant, it is a good Plea that he was not his servant at that time, *Old B. Entries 605.* For entering into a Close, that the Defendant being Lessee for life, made a Feoffment in Fee, and so a forfeiture or an Escheat, *Old B. Entries 577, 581.* That the Goods were pledged to him, or him that delivered them to him for money not yet paid, *Old B. Entries 598.*

For Fishing, it is a good Plea to say he hath a Fishing there, and under colour thereof he doth fish, *Old B. Entries 596.*

The Defendant in this Action hath many Pleas to plead in avoidance of this Action by way of excuse. As to an Action of Trespafs for the Defendants Cattell breaking into the Plaintiffs Close, it is a good Plea to say that they came in through the mounds of the Plaintiff, for want of sufficient repair. For further knowledge of which point, these things are to be known.

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1 This is not a good Plea for any but for him that hath some interest in the adjoining Ground, as having Title of Common there, or being Lessee for years, or at will, of it, having his Cattell there at Tack, or having leave to put in his Cattell there, and therefore this will not barre the Action of the case of a stranger where his Cattell had nothing to do in the next Ground towards which the Inclosure was so bad.

2 Neither is this any good Plea for him that hath some interest in the Ground adjoining, where he did put in his Cattell first of all into the Plaintiffs ground, and not into his own, for the Cattell must go in of themselves.

3 It is no Plea that there is no good Inclosure, unless he say that the Gwner of the Oround time out of minde did use to inclose it.

4 It is sufficient proof to maintain this Plea, that the mounds were bad at the time, though it cannot be proved that the Cattell went in through those bad mounds, for that shall be presumed unless the contrary appear, *Dyer* 365. *Breo. Tresp.* 192. 253. 148. 145. 136. 345. In Trespafs for breaking pales, that they were set up in his Chase, and kept his Deer from feeding, &c. *Old B. Entries* 594. If a man that ought to make the Hedge between him and me, go over it and break it down, so as my Cattell get in his Ground, I may plead this in avoidance of his Action, *Just. Dodridg. Trin.* 18. *Jac. B. R.* If the Action be for taking my Cattell, I may justify that the Ground was a Free-hold, and the Cattell were in my Ground Damage fasant, and therefore that I Distrained them, *Old NB.* 570. 569. 571. In an Action for cutting Timber that *I.S.* was seized of the place and Timber, and sold the Timber to the Defendant, and he took it, *Old B. Entries* 606. For taking Goods it is a good Plea to say, That the Defendant being possessed thereof, delivered them to a stranger from whom the Plaintiff took them, and the Defendant took them from the Plaintiff, *Old B. Entries* 573. or to say that he did lawfully distrain them for Rent or the like, *Old N.B. Entries* 608.

That I am Parson of *A.* and a Parishioner set out his Tythes,

Release.

Matter of discharge.

Release of one.
Sect. 25.

Amends.

Where one
may plead Not
guilty or not,
but he must
plead Specially
Sect. 24.

and the Plaintiff took them away, and I took them from him, this is justifiable, *Old B. Entries* 374. To say that the Plaintiff gave him the goods, *Old B. Ent.* 376. or to say he took them as Waif, Elstray, or as Wreck for the Lord, &c. *Old B. Entr.* 612. 611. 577. Sale in Market overt to the Defendant by the Plaintiff or a stranger, *Old B. Entr.* 606. 605. A release of the party trespassed to the Trespassor, is a discharge in Law, and be pleaded in barre of this Action.

If divers do a Trespass together, and the party to whom it is done release it by generall or speciall words to one of them, this is a discharge of all the Trespassors, and every one of them may plead it in barre if he can get and shew it, for they are but one Trespassor, and each of them is answerable for the whole fact, but a Release is a good satisfaction in Law as a satisfaction in Deed, *Hob. Rep. pl.* 96. But see more of this in *Release, chap. 19. in my Book of Common Assurance. Old B. Entries* 602.

Tender of amends, that is, offer of a recompence for a Trespass done, is a good Plea in this Action. But therein these things are to be done. 1 That if one distrain my Beasts Damage sefant, and I offer him a competent recompence before the Beasts be taken, or before they be impounded, this is a good barre, and so may be pleaded in the Action of Trespass: but such a tender after the impounding of the Beasts is not so, *Coo. 5. 76.* 2 And yet in all Actions *Quare Clansum fregit*, if the Defendant do tender sufficient amends before the Action brought, and in his Plea to the Action disclaim to make any Title or claim to the Land, and the Trespass be by negligence or involuntary, by this (being proved) the Plaintiff shall be barr'd, *Stat. 21 Jac. chap. 16.* And it was the opinion of two Justices, *Popham* and *Williams, Trin. 3 Jac. B. R.*, that the common Law was so before this Statute.

The Defendant in this Action may plead Not guilty in all these following cases: 1 When the thing supposed to be done for matter of fact, is not true. 2 When the matter as it is, is not a Trespass, but some other offence, nor is this Action of Trespass given for it, but some other Action. 3 When the Lands or Goods is mine for which the Action is brought,

not

not the Plaintiffs. But in all other cases the Defendant may not plead Not guilty, but must plead specially, and shew the special Matter by way of excuse or justification, as the case is. And therefore he must plead and justify specially in all these following cases; as where an Imprisonment or entry is given by authority of Law, or by Authority from any party, as for an Imprisonment by the Statute of Trespassors in Parks, putting a man off his ground, arresting a man as Constable to keep the peace, thrusting a man out of a Church that doth trouble the Congregation in Service. That he parted an affray, and kept the quarreller apart, during the heat. *Old B. Entries 555, N. B. of Entries 643.* For an Assault or Battery *de son assaut de mesme*, in defence of himself or his. For a Trespass by entry into Land, that it is his own Free-hold, or anothers Free-hold, and he did it by Warrant from him, *N. B. Entries in toto. Old B. Entries in toto.* That they entred in their perambulation. *N. B. Entries 651. 558.* That the Cattell came into his Close by the default of the Plaintiffs closing. *Coo. upon Litt. 282.* That it is a common High-way, *Old B. Entries 559.* That he entred to amend his gutter leading to his house, as of ancient time they had been used to do, *Old B. Entries 561.*

Imprisonment

For Entry into a house, That it was a common Inne, &c. *Old B. of Entries 549.* So if the Defendant justify by reason of a Rent-charge, he must plead it especially, and cannot justify it upon a Not guilty, *Old B. Entries 549.* So if one put in his Cattell by agreement with the Plaintiff, *idem.* And yet it seems if he be to justify by reason of a Title to the Land, he may plead Not guilty, and give the special matter in Evidence, as in Detinue, *Non Detinet*, when the goods are the Defendants, *22 H. 6. 33. Coo. upon Litt. 283.* For Entry into a house and taking Money away, That the Plaintiff owed him the Money, and he went into his house to receive it, being invited by the Plaintiff, *Old B. of Entries 561.* And if the Action be for taking goods, and the Defendant justify the taking, as a Harriot, wayf, estray or wreck, *N. B. Entries 666.* Or that the Plaintiff took away the Defendants Cattell, and he entred into the Close where they were, and

Entry into
Land or a
House.

and took them again, *Old B. Entries* 562. 561. 612. 611. That he took the Cattel damage-fesant in his ground, *Old NB. Entries* 450. That the goods were the goods of *I. S.* delivered to the Plaintiff to keep, and *I. S.* commanded the Defendant to take them, *Old B. Entries* 557. 556. Or excuse it that the Plaintiff delivered them to him, *Old B. of Entries* 556. That the Plaintiff was in debt to the Defendant, and gave him the goods in satisfaction of his debt, *Old B. Entries* 556, 557. That he took them by a Writ, *Old B. Entries* 671.

Battery.

The Action is for a Battery, and he justifies, as Schoolmaster giving moderate correction, *Old N.B.* 555.

In Trespafs for taking away Goods, That a stranger took them away, and gave them to *I. S.* and the right owner commanded the Defendant to take them as he did, *Old B. Entries* 562. In an Action of Trespafs for taking away a box of Writings, it is no good justification to say, there was but one Writing in it, which was the Defendants, for a man cannot justify the breaking or taking away of anothers box to fetch or take out his own goods, *Fitz. Tresp.* 73.

And if in these cases where the Defendant hath cause of excuse or justification, and should plead specially, he plead the generall Plea of Not guilty, it will upon the evidence (the case appearing so) pass against him: for he may not give the speciall matter in evidence. But this must be understood with two Cautions: 1 That whensoever a man cannot have advantage of the speciall matter by way of pleading, there he shall take advantage of it in the Evidence. For example, the Rule of Law is, That a man cannot justify in the killing or death of a man, and therefore in that case he shall be received to give the speciall matter in evidence, as that it was *se defendendo*, or in defence of his house in the night against Thieves and Robbers, or the like. 2 That in any Action upon the Case, Trespafs, Battery, or of false imprisonment against any Justice of peace, Mayor, or Bayliff of City or Town corporate, Headborough, Portreve, Constable, Tythingman, Collector of Subsidue or fifteen in any of the Courts at *Westminster*, or elsewhere, concerning any thing by any of them done

done by reason of any of their offices aforesaid, and all other in their aid or assistance, or by their commandment, &c. they may plead the generall issue, and give the special matter for their Excuse or Justification in Evidence.

In an action of Trespas or other sute against any person, for taking of any distresse or other act doing, by force of the Commission of Sewers, the Defendant in any such action shall and may make Avowry, Conusance, or Justification generally, that it was done by authority of the Commission of Sewers for lot or tax assessed by that Commission, &c. And the Plaintiff shall reply he did it of his own wrong without such cause. And both these acts were made for avoiding of prolixity and captiousnesse of pleading, tending to the great charge and danger of officers and ministers of Justice, &c. *Co. upon Litt.* 282. 283.

If any action be brought against any person for doing any thing by virtue of an Ordinance of Parliament, by the persons enabled to do it, or others by their command or in their aid, it must be laid where the fact was done, not elsewhere, and the Defendant may plead Not guilty, and give in evidence the Ordinance of Parliament, and if it appeare not to be done in the same County where it is laid, the Jury shall find for the Defendant; and if the verdict passe with the Defendant, or the Plaintiff be Nonsuit, or suffer a discontinuance, the Judges shall give to the Defendant double costs, *Ord. 2. Dec.* 1646. If any officer or their assistants be sued for any thing done by authority of the Ordinance of 9. *Feb.* 1647. he must be sued in the County where it was done, he may plead the generall issue, and he shall recover double costs, *See the Ordinance.* The like remedy is given in divers other cases by divers other Ordinances of Parliament.

And now by the late act made 23. *Octob.* 1650. The Defendant may plead the generall issue of Not guilty, or such like generall Plea, and give the speciall matter in evidence.

CHAP. LVI.

Of Waste.

What it is.

How many
kinds there are.Writ of Waste
what it is.How many
kinds of it
there are.
Sect. 1.*Locum vastatū*

THis word (Waste) is sometimes taken for a wrong done by a Tenant to him in Reversion; where a Tenant for his owne, or anothers life, in Dower, for yeares, or by the courtesie of England, or a Gardian in Chivalry, when hee to the prejudice of him in Reversion, or the Heire, doth make waste or spoyle in the Houses, Woods, Gardens, Orchards or Lands he doth hold. And so it is either voluntary, when the Tenant doth willingly doe it: or it is permissive and negligent, when the Tenant doth suffer it to be done. *Termes Ley. Coe. upon Lit. 1. part. 53. 57.* This word is sometimes also taken for the Action or Writ that is given to relieve a man against such a wrong done, which is defined to bee a Writ lying, where any Tenant for life, yeares, in dower, by the courtesie, or Gardian in Chivalry doth make waste; then hee in Reversion shall have this Writ. And this is either in the *Tenet*, when it is brought against him that hath the present estate, or in the *Tenuis*, when it is brought against him that had, but now hath not the estate in the land: And by this Writ in the *Tenet*, the waste being found, he shall recover treble damages, and *locum vastatum*, the place wasted. (i.) The Lessee for life or yeares that is convicted of this offence, shall lose; and the Plaintiffe in this suit, if he recover, shall recover treble damages and the place wasted: (that is) if it be in a whole house, the house, the whole house; if it be in one or two rooms *sparsim* those Roomes; if it be in a Close, as much of the Close as is wasted; if it be in Trees or Hedgrowes, the circuit of the root and no more; and if it be in a corner of a Wood here and there, that corner of the Wood only; but if it be in divers places of the Wood *sparsim & circumquaque*, here and there, perhaps the whole Wood: And this hee shall recover discharged of all incumbrances. So that if Lessee for life make a Lease for yeeres, and after enter into the Land and make waste, and the Lessor recover the Land in this Action, he shall avoid the Lease made before the waste done. And if Lessee for life

life doe waste, and after grant a Rent out of the Land, and after in this Writ the Land is recovered, the Lessor shall hold it discharged : But if the waste be before the grant of the Rent, *contra*, *Coo.* upon *Lit.* 233. But if it be in the *Tennit*, nothing can be recovered but damages. And if the waste bee done by a Gardian in the Wards land, to the value of twenty shillings, the Ward may sue this Writ, and shall hereby gain his libertie ; and the Gardian shall lose the wardship of body and land : And if this be not sufficient, the Ward also shall recover damages besides. *Marlb.* chap. 23. *Westm.* 2. 14. Stat. Waste 10 *Ed* 1. *Glouc.* chap. 5. old *N. B.* 36. *Coo.* 1. part 54. *Coo.* 11. 50. *Dyer* 281. 15. *H.* 1. 7, 14. *Ed.* 3. 10. 13. *Fitz.* Waste 62. 75. *F. N. B.* 49.

This Action lyeth and may be had by him that is in reversion or next in remainder, in fee simple or fee-tayle, after the particular estate for life &c. ended ; or by his Heir, or by the grantee of the Reversion, or remainder, or by the grantee of such Heir or Grantee : And so by any Grantee of the Reversion in *infinitum*. *Coo.* 1. part. 53. *F. N. B.* 57. But a Tenant for life, or he that hath a lesse estate then a fee-simple or fee-tayle, may not have this Action. *Noy* 26. *Coo.* upon *Lit.* 273. But it will not lye for an Heire, or a Grantee, for a waste done by the Tenant in the time of the Ancestor or Grantor : Nor can the Grantor, after this Grant, bring an Action of waste for waste before or after the Grant. Nor will it lye for the Grantee of a Reversion for a waste done by the Tenant before or after the Grant untill Attornment ; nor after Attornment will it lye for any waste done before Attornment ; though it were not punished before by the Grantor. *Dyer* 31. *Coo.* 6. 68. *Perk.* 93. 48. *Ed.* 3. 15. 9. *H.* 7. 20. And yet it is said, if an Action of waste be depending, and the Ancestor dye, that the Heir may finish this Action. Stat 11. *H.* 6. 5. And if two Copartners be of a Reversion, and a waste is committed, and one of them dye ; in this case the Survivor and the Aunt may maintaine this Action *Coo.* 1. part 53. A body politique and the Successor or Grantee of such a body that hath a Reversion, may have this Action. But yet such persons cannot have this Action for any waste done in the time of

Where this Action lyeth or not.

1. In respect of the person wronged ; and who may have this Action or not. And for what Waste :

Sec. 2.

their Predecessors. *F. N. B.* 54. If a lease bee made for life the remainder in tayle to another, the remainder in fee to the Lessee for life; and the Tenant for life, doe waste; hee in the next remainder shall have the Action against him. *F. N. B.* 60. *Co.* 1. 45. And if there bee Tenant for life, the remainder to another for yeares, the remainder to a third in fee, or in tayle to a third, or a third have the Reversion, and the Tenant for life doth waste; in this case the Action may bee brought against him presently; but execution for the Land may not bee had till the lease for yeares bee ended. But if the meane lease be a lease for life, no Action will lye till the death or surrender of the Lessee. *Remoto impedimento emergit Actio* *Co.* 5. 76. 2. 92. *F. N. B.* 59. And if one make a lease for life, and after grant the Reversion for yeares; no Action will lye during the yeares. But if after a lease for life the Lessor shall make a lease for yeares to begin after the estate for life ended, this is no impediment. *Fitz.* Waste 18. Also the Lord that hath a Reversion by Escheat, and one that had had a Reversion granted from the King, & he that hath a Reversion by devise; though the Tenant have not attorned, may have this Action for waste done by the Tenant, *F. N. B.* 60. And yet it seems in *Kelw.* 109. That this Action is not maintainable without a privitie which is not in the case of the Lord, in by Escheat. If Tenant in tayle make a lease for life of the Land, & the Lessee for life doe waste; the Tenant in tayle shall have the action.

Joinder in Action,

Jointenants.
Tenants in
common,

If two Jointenants, Partners, or Tenants in common bee, and one of them before partition made, make a lease to a stranger, and hee doe commit waste, they must both of them bring the action; but hee only that made the lease shall recover the damages. *M. 8. Jac. Curia. Co.* 1. part 53. *F. N. B.* 60. And if *A.* and *B.* bee Jointenants for life, the fee-simple to *B.* and they two make a lease for life, and the Lessee doe waste; in this case they two must joine in this Action. 13. *H. 7. 15. F. N. B.* 59. For one Tenant in common of a Reversion cannot have an Action of waste alone without his companion. *M.* 36. 37. *Eliz. C. B. Hill. and Harts Case.* And if Tenant for life and hee in Reversion or remainder in Fee, joyn in a lease for life or yeares, and this Lessee do waste; they

they must both joyne in this Action : and the first Lessee for life shall recover the place wasted ; and the first Lessor the treble damages, 27. *H. 8.* 13. 22. *H. 6.* 24. *Coo.* 1. part 42. If the Lands bee granted to two, and the Heires of one of them, and the Tenant for life doe waste ; in this case the other Jointenant cannot have this Action ; but his Heire may, *F. N. B.* 87. *Coo.* 1. part 53. 200. If a woman-Covert, have any cause to bring this Action, shee and her husband must joyn in it : and if they two make a lease of their or of the wives land, and the husband dye, and shee take another husband, and the Lessee doe waste, the husband and wife must bring the Action. So if three Copartners divide the land, and one of them hath a Reversion to her part, and then shee marry a husband, and after the Tenant doe waste ; in this case the husband and wife must joyne in the Action. 9. *H. 6.* 43. *F. N. B.* 57. If there be husband and wife in remainder in speciall tayle, and the wife dieth without issue ; in this case the husband cannot now have this Writ against the Tenant ; and if the Suit were begun it will now abate by her death, *Coo.* upon *Lit.* 285. Husband and Wife.

This Action lyeth against a Tenant for life, either his owne or anothers life, occupant, a generall or a speciall Tenant in Dower, or by the Courtesie, a Tenant for yeares, though but for one yeare, or halfe a yeare, *Glouc.* chap. 5. *F. N. B.* 60. *Coo.* 10. 9. 6. 37. 6. 73. But not against a Tenant in fee-simple, fee-tayle, in tayle after possibility of issue extinct, or against him that hath an estate of Franktenement only distendible ; as if Tenant in tayle make a Feoffment or bargain, and sell his land to another and his Heires, *Coo.* 10. 98. Nor against a Tenant by *Elegit*, Statute Merchant or Staple, Tenant in Mortgage, or tenant at will, *Coo.* 50. 89. 1. 57. 6. 41. *N. B.* 41. *F. N. B.* 59. Nor will it lye against Lessee for yeares or life after surrender of his estate to the Reversioner, and his acceptance thereof, old *N. B.* 36. *M. 4.* 74. *B. R.* in *Morley's* case. It lyeth against Lessees for life or yeares, for waste done by themselves or Strangers, and that whether they come by their estate by lease or devise, *Plow.* 10. *Coo.* 1. part 53. If Lessee for life make a lease for yeares, and the Lessee for yeares doe waste ; hee in Reversion must have his remedie

Abatement.

In respect of the persons that doe the wrong and : gainst whom it lyeth or not. And for what waste.

Sec. 3.

against the Lessee for life; and hee shall have his counter-remedy against the Lessee for yeares, by Action of the Case, *Pasch. 38. Eliz. B. R.* If Lessee for yeares grant away part of his terme, the Action must be brought against the first Lessee; and not against this Lessee of part of the terme. If Tenant in Dower, or by the Courtesie, assigne or grant over his or her estate, and afterwards the Grantee doe, or suffer waste, the Tenant, not the assignee, must be sued, *F. N. B. 56.* If a Lessee for life or yeares grant over his estate in the land, but doth still take the profits of it, or grant it over to that end that he in reversion may not know against whom to bring his Action: in this case he may bring his Action against the Lessee or his assignee, at his choice, *Stat. 11. H. 6. 5. Co. 5. 77.* It lyeth against a Lessee for life or yeares, after he hath assigned his terme for the waste done by him before the Assignement. But for the waste done after the Assignement, the action must be brought against the Assignee; and so each of them are to be charged for his owne time. And yet if the Lessee begin a waste and then grant over his estate, and the Grantee continue the wasting; in this case the action may be laid against the Assignee, *F. N. B. 56. old N. B. 37.* If Tenant *pur autre vie* doe waste, and the life die; yet the Tenant may be punished in this action, *Co. 1. part 285. Co. 7. 2. 5. 12.* If the Tenant grant his estate over on condition, and the Grantee doe waste, and the Tenant enter for the condition broken; the action must be brought against the Grantee, *Co. 1. part 54.* It will not lye against Executors or Administrators for a waste done by the Testator, for *moritur cum persona*, *Kelw. 105. F. N. B. 57.* And yet it will lie against the Executors of a Lessee for yeares, for waste continued by them: as if a Lessee for yeares begin a new waste by digging a Mine, or the like, and devise the terme to another; and the Executors enter and continue the waste, goe to dig in the Mine, or the like, and after assent to the Legacie: this action will lie against the Executors for this continued waste, *Co. 5. 12. 10 Ed. 4. 1.*

Executors.

Infant.

Husband
and
Wife,

This action lyeth against an Infant, not only for a waste done by himselfe, but also for a waste done by a stranger, *Co. 1. 53.* This action lyeth against Husband and Wife. If a

Lease

Lease be made to the wife alone, for life or yeares, and shee or her Husband doe make waste, this action must bee against them both whiles they are living, and it will not lie against one of them. *F.N.B.* 57. But if it be a Lease for life, and shee die; the action is gone and will not lie against the husband, albeit he did joyne in the waste: and yet if the husband bee possessed of a terme in the right of his wife, and he doe waste, and then the wife die; in this case he may bee sued for this waste, *Coo. 1. part. 54. Coo. 5. 75. 2 H. 4. 3.* And if shee be Lessee, and take a husband that doth waste, and die, shee may be charged for this, *F. N. B.* 58. 59. *N. B.* 36. If lands be given to husband and wife, and the heires of the body of the husband, or the heires of the body of the wife, and he die, and shee doe waste; or shee die and hee doe waste, in this case the heire may have this action against the Husband or Wife, as the case is, *F. N. B.* 57. It is said, That if a husband and wife have a joynt estate, and the husband doe waste and die, and the wife agree to the Estate, that the action will lie against the surviving wife, for this waste of the husband, *sed quare Coo. 1. 53. N. B. 36. 58. 59. Broo. Waste 11.*

If a Tenant in Dower, or by the Curtesie, grant over her or his Estate, and afterwards waste is done; for this waste the action must be brought by the heire against the Tenant, not the Assignee; and yet if such a Tenant by the Curtesie grant over his estate to a stranger, after he hath attorned to the Grantee, of a Reversion upon a grant thereof made before; and the Assignee doth waste, in this case the action must be brought against the Assignee, and not against the tenant by the Curtesie. So, if the Wife, Tenant in Dower, grant her estate to a stranger, and after the Heire grant the Reversion in Fee to another, and the Tenant attorne, and after the Assignee doth waste; in this case the action must be brought against the Assignee or the Tenant in Dower, not the Tenant her selfe; for in both cases after the Heire hath granted away his Reversion, the Tenants after assignement of their estates, shall not be charged, *Coo. 1. part 54. 310.*

If there be two Jointenants, or Tenants in common, in Fee or for life, of a Wood or Common of Turbarie, or fishing, or the

Tenant in
Dower by the
Curtesie.
Sect. 4.

Tenant in
Common.
Jointenants,
&c.

the like ; and one of them doth waste against the will of his companion, hee may sue the other ; and hee may bee sued for this : otherwise it is of Partners. *Coo. 1. part 200.*

Disseizor.

If Tenant for life bee disseized of his estate, and the Disseizor commit waste ; the Lessee for life, not the Disseizor shall bee charged in this action for this wrong. *Broo. Waste 36. N. B. 37.*

Stranger.

If a stranger against the will of the Lessee, Tenant in Dower, &c. doe waste ; this Action may not bee brought against the Stranger, but the Lessee or Tenant for this waste : and hee shall by an action of Trespasse recover as much as hee loseth against the Stranger. *D. & Sr. 34. Coo. 1. p. 54.*

Gardian in Chivalrie :

It lyeth against the Gardian in Chivalrie, for waste done by himself, but not for waste done by a Stranger. *Coo. 6. 7. 1. part 54.* And so also his Grantee of the Wardship ; but against each of them for the waste in his owne time only. And yet it is said, it will lye against the Assignee of this Gardian, for the waste done by the Gardian. *Coo. 5. 12. Fitz. Waste 10.* If two Jointenants bee of a Ward, and one of them doe Waste, both of them must bee sued for it. *Coo. 1. part 54.*

In Soccage.

It is said, it will lye against a Gardian in Soccage for waste done by himself ; though not for waste done by a stranger, *F. N. B. 59.* But the contrary is affirmed by *Coo. 1. part 54.*

In respect of the thing in which the wrong is pretended to bee done.

In Houses.
Sec. 5.

Voluntary and negligent waste are alike punishable, *Dyer 281.* The Lessee or Tenant is bound by Law to keep the house in as good case and plight as they are when hee comes to them ; and if hee doth not so, but suffer any part of it, by his negligence to grow ruinous ; this is waste, for which the Lessee may sue the Lessee in this Action, *Broo. Waste 130.* But for the further opening of this point, take these things. First, To suffer it to decay, is waste ; albeit there bee no Timber upon the thing to repaire it ; for the Tenant must procure Timber at his owne charge. Secondly, To prostrate, abate or breake downe any of the houses, either the whole or part (that is) any of the principall walls, or walls of partitions in chambers ; or else whether they bee of stone or mud, is waste. *Broo. Waste 26. Keltw. 37. 10. H. 7. 2. 5. F. N. B. 59.* And yet to throw down the posts or frame of a house remaining

ing of an old building, or set up for a new building, it seemes is no waste, *Broo. Waste* 107. Thirdly, If the house bee uncovered by tempest, and the Tenant doe not re-
 paire it in convenient time, this is waste. *Coo. 1. part 53.* Fourthly, To suffer the house to bee burnt by negligence or
 mischance, is waste. *Coo. 1. part 53.* Fifthly, If the house
 bee ruinous when the Tenant comes first into it, and hee pull
 it down, and doe not build it up again, this is waste. *Coo. 1.*
part 53. Sixthly, It is waste in the Tenant (as some say)
 to build up a new house, though with Timber of his owne;
 yet others doubt of this: And if after it bee new builded,
 the Tenant suffer the house to decay, this is another waste.
 And yet to pull downe an old house ready to fall, and to set
 up another with his owne charge, of the same length and
 bredth, is in the Tenant no waste. So neither to set up a house
 with his own Timber that was blown downe by wind or tem-
 pest, though it bee lesler than the former house. *Broo. Waste*
39. 93. Coo. 1. part 53. 12. H. 4. 6. 11. Ed. 2. Statham.
 Seventhy, To take away, pull off, or breake downe the
 Wainscots, Doores, Windowes, Benches, Furnaces, or any
 other the inseparable incidents of the house, being set up and
 fastened by the Lessor or Lessee, or whomsoever; is waste,
Coo. 4. 94. 1. part of his Inst. 53. Eightly, To suffer the
 houses covered at the time of the Tenants taking to it to bee
 uncovered so long, as that thereby the principall pieces of
 timber of the house (*viz.*) the Beames, Rafter, Sparres, Plan-
 chers, &c. doe putrisie and rot, is waste. But the not cover-
 ing of a new frame of building uncovered when the Tenant
 comes to it, is not waste. And if it bee uncovered when the
 Tenant comes to it, though by this meanes the house fall
 downe, it is no waste; and if the uncovering doe not pro-
 duce the effect of marring the timber, this is not a waste. *Coo.*
1. part 53. Broo. Waste 69. 455. 82. 12. H. 4. 4. 10. H. 7.
2. F. N. B. 59. Ninthly, If the house bee prostrate by tem-
 pest, floods, or burnt by lightning, or bee prostrate by Ene-
 mies, without any default, or power to prevent it in the Ten-
 ant; or if at his coming into it, it bee so ruinous that it can-
 not bee keep up, and it fall downe; and the Tenant build it

up again with such materials as remaine, and other timber of his owne; or (as some say) the timber upon the ground, and build it no larger than it was; this is no waste. *Co. 1. part. 53. 54. Bro. Waste 117. 82.* Yet I doubt of the last: for hee is not, in these cases, bound to repaire it; nor are these spoyles any such waste, for which the Tenant is at all punishable. *Co. 10. 139. 11. 41. 4. 64. F. N. B. 59. Bro. Waste 19. 130. Dyer 36. F. N. B. 60. 20. H. 7. 2.*

In Trees and
Woods,

The Tenant is to preserve the Timber-trees on the Land, and if hee make spoyle in them, this is Waste; for which, hee in Reversion shall have this remedie: But for farther opening of this point take these things. First, To cut or breake downe or roote up Trees that are, or may bee Timber; as Oake, Ash, which are Timber in all Countries; or other Trees in some Countries where Timber is scarce: Blame whether young or old, above or under twenty yeares of age, to sell, build a new house or a new roome, or to any other purpose then towards the necessarie repaire of the old house or housing, being on the land at the time of the Lease, and in decay by age or tempest, is Waste. *15. H. 7. 21. Kell. 95. 11. H. 4. 11. 12 H. 7. 1. Dyer 314. 11. H. 6. 1. F. N. B. 59. 7. H. 6. 40. Co. 10. p. 53.* Secondly, To cut downe timber for reparations at unseasonable times, that it dye; or to cut it, and after to sell it, or imploy it to any other use, is waste: And though after sale hee buy it againe, and imploy it to reparations; yet it is said this will not helpe the case. *12. Ed. 3. Waste 28.* Thirdly, some say, To cut downe timber to build new houses, broken or burnt down by fire, water, Enemies, or the like hand of God, is waste; because hee is not bound to repaire it; nor is it any waste in the Tenant. *Dyer 36. Perk. 738.* It hath beene said, That if a Tenant cut downe timber-trees, before there is need of reparations, and keep them till the timber be somewhat seasonable; or to cut down more than enough, so hee keep it for that use, and doe not mis-employ it, is no waste; *M. 37. G. 38. Eliz. per curiam.* But it seems the contrary hath been adjudged. *M. 39. 40. Eliz. C. B. in Gorges case.* But if an apparent need appeare, it may bee cut a little before it bee used. *Co. 1. 139.*

11. 48. 6. 64. *F. N. B.* 59. Fourthly, So it is said, That to cut down timber for necessary reparations, and then to sell it, and use his own, or so much thereof for reparations, or reparaire the houses with the money, is waste, 12. *Ed.* 3. Waste 20. I doubt this first case, *Coo.* 1. part 53. Fifthly, To cut down timber to reparaire the houses decayed by the Tenants default, it is waste, and a double waste, *F. N. B.* 59. *Coo.* 1. 53. If a house bee ruinous at the time of a lease, and after fall, and the Tenant cut down timber to reparaire it; this is no waste, *Coo.* 1. 54. Sixthly, To cut young timber-trees to reparaire, when there is enough of fitter timber besides, is waste, 11 *H.* 6. 1. 13. *H.* 7. 11. *F. N. B.* 60. Seventhly, To cut down all the under-woods, in a Wood where no high-woods are growing amongst it, is waste, *Broo.* chap. 4. 1. So to cut down such a Wood, and then to suffer Cattell to crop it, being newly felled, and kill it; or to root and stub it up; this is waste *F. N. B.* 59. *Coo.* 1. 53. Eighthly, To cut down timber-trees for fire-boor, and hedg-boor, when there is enough other boor, is waste, per two Justices *P.* 7. *Jac.* *B. R.* Ninthly, To cut down such trees for fire, as are not fit for fire, being timber, and only hollow and dry at the top, is said to bee waste: But if they bee hollow, and drye, and dead, that they beare nor fruit nor leaves in Summer; if then the Tenant cut down such trees for fire-boor, this is not waste. And by this, it seemes, otherwise they are not to bee cut down for fire-boor, *Dyer* 332. *Coo.* 1. part 53. And yet trees that will never bee fit for timber, it seems, may bee cut for that use, 11. *H.* 6. 1. Tenthly, If a man lease his land, wherein is an open Mine, to another, with all the Mines in it, for yeares; and the Lessee cut timber trees upon the land, to uphold the earth about the Mines, to keep it from falling; it seems this is no waste, *Pasch.* 17. *Jac.* *C. B.* Eleventhly, To cut down more for fire-boor, hay-boor, hedg-boor and house-boor (to keep it as hee found it) than is necessary; or to cut down the green wood, when there is sufficient dry and dead wood, is waste, *Broo.* Waste 130. *F. N. B.* 59. *Coo.* 1. part 53. 88. Twelfthly, It is said, That to cut down Willows, Beech, Birch, Maple, or Aspe that

grow in the sight and view of a Mannor-house, or are a safeguard to it, is waste, 40. *Ed. 3. 25. Co. 1. part 53.* Thirteenthly, To cut great Hazels in a Wood and Country, where is no other wood, may bee (as some say) waste, 40. *Ed. 3. 25. Broo. Waste. 21.* Fourteenthly, To shroud timber trees at seasonable times; to cut down, or fell Willow, or other trees that will not bee timber, dead wood, or underwood, for fire, is no waste, *F. N. B. 59. 60.* Fifteenthly, To fell Copices and under-woods to fell every five, ten, or twenty yeares, as the course of the Country is, and tenants have been used to doe, is no waste, 10. *H. 7. 2. F. N. B. 59. 60. 11. H. 6. 1.* Sixteenthly, To cut or mooste Thornes or Bulhes growing in a ground for the bettering of it, is no waste, *Dyer 37. 43.* So to cut up black-thorne to burne; though it bee in a champion counaty, where fuell is scarce, *M. 8. Ja. Curia.* And it is said, it may bee waste, to cut white-thorne in such a country; unlesse it bee for reparations. So to suffer it to bee destroyed. So it is said by some, That to cut down, or grub up quick-set hedges in a country where fuell is scarce, may bee waste, *Broo. Tresp. 136. 134. 411. Co. 1. part folio 53.* For that may bee waste in a field-country, that is not waste in wood-land countrey. The breaking of a hedge in other cases, is no waste, *Broo. Waste 34.*

Thornes.

In Gardens or
Orchards.

To cut down fruit-trees, Apple-trees, or Peare-trees, or Plum-trees, or the like, growing in an Orchard or Garden; though it bee for reparations, is waste. So to take away, cut, or pull up such trees half broken by the wind or otherwise, whiles they doe yet beare fruit, or the young springs of them that may beare fruit, is waste, 10. *H. 7. 2. 48. Ed. 3. 44. Broo. Waste 19.* And yet it is no waste to cut, or destroy such fruit-trees growing in the fields, out of an Orchard or Garden, nor in an Orchard and Garden, when they are utterly subverted and fruitlesse, *Broo. Waste 82. 39. Co. 1. part 53.*

In lands.

To dig or care up the ground, to make gutters or gripes to the hurt of the ground, may bee waste. So to care up ancient deep Meadow, not ploughed in mans memorie; grub up wood and turn it into eirable; or turn errable into a Wood, is waste, *Dyer 37. Co. 1. p. 53.* But to dig or gripe
a foggie

a foggie Medow, for the bettering of it, is no waste : or to let ones errable, or other ground lye fresh ; or let Thornes or weeds over grow it ; or to plow up ground that hath been ploughed within the memorie of man ; or that is sometimes errable, and sometimes Medow ; or sometimes Medow, and sometimes Pasture ; this is no waste. *Dyer* 361. *F. N. B.* 59. 2. *H.* 6. 11. *Hil* 8. *jac. B. R. Tresham's case* : If the Tenant being bound to repaire the banks, for lack hereof suffer the water to over-flow and much to hurt the ground ; this may bee waste : But if the over-flowing bee by some extraordinary flood, *contra*, *Coo.* 10. 139. 1. part 53.

If the Tenant shall open, or dig new Quarri for Cole, Stone, Brick, Mettall, Gravell, Lime, Clay, or the like ; this is waste ; unless there bee speciall words in his lease, to warrant it : But it is no waste for the Tenant to dig forwards, in an old Mine that was opened before. And if a lease bee made with the Mines, yet if the Lessee open any other Mines, That what was open before ; this is a waste : But if no Mine were opened before ; then it said the Lessee may open the Mines, and not doe waste, *Coo.* 5. 12. 1. part 53. 54. It is no waste to dig the land for Gravell, and such like necessities for reparations, *Coo.* 1. part 53. 54. To sow errable ground to woad, is said to bee waste ; because it will beare no Corne the next year ; *Tresham's case*. To suffer errable to bee drowned so that it turn to clay ; or to suffer Medow to bee drowned, so that it turn to bee hereby Rushie, and little worth, may bee waste, 20. *H.* 6. 1. 1.

To suffer the walls, or pale of a Parke to bee so decayed, that it want inclosure, that the Deer are, or may bee dispersed, may bee a waste, *Broo.* 130. *Coo.* 1. part 53. So to kill or destroy all the Fish in a Pond, may bee waste, 6. *R.* 2. *Stratham*. So to take so many young out of a Pigeon-house, Warren, Parke, Vivarie, Estagnes, or the like, not maintaining that store that was there, when the Tenant came first, may bee a waste, *Coo.* 1. part 53. It is said That to suffer a mud wall, thatched, or tyled, to bee uncovered, whereby it perish and fall, is a waste, *Broo.* Waste 39. But if it bee uncovered when the Tenant comes to it, it is said to bee no

waste; and so though hee take it down, *Broo Waste*, 94: *Coa*. 1. part 531. But none of these things will bee waste in a Tenant, where hee doth them by the leave or command of the Landlord; *Dyer* 37. *Kalm* 37. 8. *H. 8.* 5; nor when his lease is without impeachment of waste.

In respect of
the Case.
Sec. 6.

If one demise a Close, *Habendum* the close with the Trees; and the Lessee cut the Trees; this is a Waste: for the Trees doe not passe by the *Habendum*, being not in the premises of the Deed, *Pash*. 7. *Pat. Co. B.* Sir Francis Leakes case.

If one make a Lease for yeares or life, by words of Demise and Grant, of a Close with all the Timber trees except Oakes; and the Lessee cut the Tree that are not Oakes, this is Waste; *Dyer* 375. 3. *Pat. Co.* 110. 48. If the Lessor make his Lease to the Lessee excepting the Trees; and the Lessee cut the Trees; in this case the Lessor must have an action of Trespass for the wrong; and not an action of Waste; for the Trees were not let; *Dyer* 19. *Pash* 11. case. *M. 9.* *Jac.*

Trespasse.

If the Lessor bee bound to repaire; and the Lessee doe it himself; this is not Waste; *Coa*. 1. part 541. If the Lessee cut down timber, or pull down houses, and the Lessor take it away, yet the action lyeth against the Lessee for this; *Coa*. 4. 64. 110. 48. So if a Lessee cut Timber for Repaire, and sell it; and then buy it again and repaire the houses with it; yet the action will lie for the cutting of it; *Broo*. 102. If the Lessee have covenanted not to doe Waste; and hee doe Waste; yet the Lessor may have this Action; and remedie upon his Covenant also, *M. 9.* *Jac.* *Covenants* case. If the Lessor covenant with the Lessee that hee shall take as much Timber as hee will, and hee cut Timber; it seems either this is no Waste,

or the Covenant may bee pleaded by way of *Rebuttal*; *Purfeys* case, *M. 9.* *Jac.* If the Lessor and Lessee together, doe such an act as is Waste; no action will lie for this. So, if the Lessor himself doe the thing, *Dyer* 37. *Kalm* 37. *Perk*. 180. 203. So, if the Lessee doe it by leave or warrant from the Lessor, 18. *H. 8.* 5. If the Lessee doe any thing upon the Land, which is a waste, before the Lease begin, it seems this is not actionable, *Perk* *Seft*. 602. If the ruine bee caused by the extraordinary hand of God, as by Fire, Wind, or

Water;

Water, this action will not lie for this, *Co. 64. B. 2. Waste 31.*

If the Lease bee made without impeachment of waste, the Lessee cannot doe waste: *Co. 64. B. 2. Waste 31.*

But for the opening of this clause, *Without Impeachment of Waste*, and to shew the Law herein, these things are to bee known: First, an Impeachment of waste, doth signifie a restraint from committing of waste in Lands or Tenements: And *without Impeachment*, doth signifie a libertie to doe waste, and an Estate without any such restraint *Co. 11. 82.*

Secondly, These, or the like words inserted into the Deede, are said to bee annexed to the Estate, doe change the qualitie of the Estate, and make the Tenant herein, in the nature of a Tenant in Tayle; and it addeth a priviledge thereunto, and they give the Lessee a power and interest to make waste and to dispose the thing to his own use; so that now hee hath a generall proprietie in that thing wherein before hee had only a speciall proprietie: so that now hee may cut down Trees or pull down Houses, and then if or if they bee throwne or cut down by others, hee may take the wood and timber to himself: And the Lessor sue this Action for this waste, the Tenant may bar him with this clause, *Co. 11. 82. Waste 31. 11. 84. Marb. chap. 23. Plow. 33. 11. 84. 11. 85.*

Thirdly, but it must bee those very words, or of the like sense: For if the words bee, without Impeachment of waste by any writ of waste, these words are not so large, they doe not give such a power to the Tenant, nor alter the proprietie, but only discharge the Action; so that the Lessor can bring no Action against the Tenant for the waste done, *Co. 11. 82. 11. 83.*

Fourthly, the words must bee inserted in the same Deede whereby the Estate is made, or in another Deede made at the same time; for if hee make his Lease without this clause, and after willeth that the Lessee shall hold without impeachment of waste, it is said these words worke nothing to discharge Action or give an Interest, *Co. 11. 82. 11. 83. Plow. 356. 357.* And yet if *A.* make a lease for years to *B.* and amongst other Covenants doth insert this: And the said *A.* doth for him and his Heirs covenant with *B.* that hee, his Executors and Assignes shall bar all comers during the said

Without Impeachment of Waste,
How it shall be taken.
Sec. 7.

terme sell, cut down, all the wood, trees and hedges growing upon the land; and the same carry away and convert to his owne use, without any let of the Lessor, his Heirs or Assignes; it is thought that these words will amount to this clause, and discharge the Lessee; And this was the opinion of divers Councillors, *M. 10. Car.* If a lease bee made with this clause, *Proviso, quod non prosterneat domus voluntariè*; if in this case the Lessee throw down any of the houses, it will bee waste, *Plow. 135. 9. H. 6. 35.* So if one make a lease for life, and by Deed grant, that if any waste bee done, it shall bee redressed by neighbours, and not by Suit or Plea; yet an Action of waste will lye; *Coo. 1. part 53.* Seventhly, This priviledg where it is, may bee lost; for it is annexed only to privitie of Estate. And therefore, if one that hath this priviledg annexed to his Estate, agree to change his Estate, the priviledg is gone. And therefore, if hee that hath a lease for yeares, with this clause in his Deed, accept of a Deed, of confirmation of his estate, without this clause; Or if a lease be made to a man for anothers life, with this clause, the remainder, to him for his owne life without this clause; the priviledg, by the extinguishment of the estate is gone. So if Tenant in taylor, after possibilitie of issue extinct (which holdeth after this manner) granteth away his estate to another, by this the priviledg is gone, *Coo. 11: 83.* And yet it is held, if Lessee for yeares, having this clause in his lease, doe Assign over his term, to a Stranger, that this priviledge is not gone, but shall goe to the Assignee, and the Assignee of the Assignee, *in infinitum*; for the Tenant in taylor hath only a personall priviledge, or priviledg in Law: but this is an actuall priviledg, annexed by the Lessor to the Estate; and shall goe with it. And of this opinion were divers Counsellors in *Mish. Terme. 10. Car.*

Value.

Some have said, That this Action lyeth not, except the damage come to six pence; and that the Plaintiffe cannot have Judgement where the waste comes but to twelve pence; others where it comes but to three pence; for *de minimis non curat Lex.* And yet *Coo.* in his 10. part of his *Insh. f. 54* saith, That waste done in trees, &c. the value of three shillings foure pence,

four-pence, is adjudged waste ; and that many little wastes may make up a value. And it seems, by the common practice, it will lye for any value ; only the Plaintiffe must bee sure to declare for enough ; otherwise the Declaration is not good. But if so he declare ; then if the Jury find but 1 d. damage, it is good, *Broo. Waste* 20. 70. 74. *Plow.* 329. 9 *H.* 6. 66. 38 *H.* 8. 7

If Tenant in tayl bring this Action, and hanging the Action, the estate in tayle determine, and the Plaintiffe become Tenant in tayle after possibilitie of issue extinct ; hereby the Action of Waste is gone. So if the Tenant or hee in Reversion dye, the Action is gone ; and if the Suit were begun it must abate. So if after the waste is done the Reversion bee put out of that state, wherein it was, as if it bee granted away to a stranger ; and in this case the taking of it back again will not revive the Action. If hee that hath the Reversion grant it to the use of himselfe, and his wife, and his heirs ; the waste in these cases is dis-punishable, *Coo.* 1. part 53.

By what means the Action may be determined, or not.

S. & 8.

The Pleas to this Action may bee either generall or speciall ; the generall Plea is *Nul Waste fait*. The speciall Pleas are many, either in a way of Justification, or Excuse, as the case is. It is a good Plea, if the waste bee laid to bee in not reparations ; that it was repaired before the Action brought ; This must bee Pleaded specially. But to say, it was repaired after the Action was brought, is no good Plea, *Coo.* 5. 119. 13 *H.* 7. 20. *Coo.* 4. 64. 11. 48. So it is a good Plea to any waste, that the Lessor gave authority to doe it, *Kellw.* 37. *Broo.* done 13. It is no good Plea to say, That the Plaintiffe did Covenant, to deliver Timber from off the thing to doe it, and refused ; for the Defendant in this case, may take it. But if the agreement were, That hee should have it from another thing, perhaps the Plea may bee good, *Broo. Waste* 36.

Pleas. What shall be said a good Plea in this Action, or not.

Sec 9.

It is a good Plea to say, the House, or Trees were burnt or spoyled with fire, with water, or by wind ; that the ruine was caused by some extraordinary Act of God, *Broo. Waste* 31. *Coo.* 4. 64. So it is a good Plea to say, the house fell before the Lease ; or that the Lease is surrendered to the Lessor, and hee hath accepted it, or that the Plaintiffe hath entred upon the land, and before his entrie there was no waste

Y y

done ;

done; or that the Plaintiffe himselfe did the waste; or that the house was so decayed, at the time of the Lease, that it could not bee upheld; or that the house fell with tempest, or was burnt; or that the Plaintiffe hath granted away his estate, and before the grant there was no waste done; or that the Plaintiffe hath by good words released it; or that the Lease was made without impeachment of waste, 12. H. 4. 6. 8. H. 5. 8. *Broo. Waste* 18. 29. 33. 54. *Finches ley* 55. But it is no good Plea for the Defendant to say, hee had nothing in the land, at the time of the waste done, *Broo. Waste* 22.

It is no good Plea in this Action, for cutting down Timber, or pulling down the house, that the Lessor took away the Timber or materials, *Co. 4. 64. 11. 48.* Nor that the Lessor hath a Covenant from the Lessee, not to doe waste, *Curia M. 9. 9uo. in Coventries case.*

It is not a good Plea, for the Tenant, in an Action of waste, for cutting Timber, to say, That he cut it, and keeps it till there shall be need. Adjudg *Gorges vers. Stanfield. M. 39. 40. Eliz. Co. B.* Nor to say, He cut for necessarie reparations, unless he say withall, That he imployd it to that purpose, *Dyer* 332. And yet no doubt, it may be justified to cut it a little before it be used, when an occasion of use is apparently at hand.

It is a good Plea, to say, he cut it to make posts to part inclosures; if he can withall prescribe, that there have been alwaies such an inclosure there, *Dyer* 332. And in all these cases, upon the generall issue, the Defendant may give in evidence, any thing that is no waste, as by Enemies, Tempest, Lightning, or the like. But he cannot give in evidence, justifiable waste, as to repaire the house, or the like; nor that which is in excuse, as; That he repaired it before the Action brought; and so for the like, *Dyer* 276. 272. *Co. upon Litt.* 283. 12. H. 8. 1. 29. *Ed. 3. Waste* 36. But now by the late Act of the 23. October 1656. Not guilty, or some such other generall issue may bee pleaded, and the speciall matter may bee given in evidence.

Wee must of necessity here add a word or two, of things in Action, pertinent to the things wee have before laid down; and then shall draw towards an end.

CHAP. LVII.

Of a Chose in Action.

THings in Action is strictly, when a man hath cause, or may bring an Action, for something due, or some wrong done to him: But it is taken more largely, and comprehendeth other things of the same nature; as an Action of Debt upon an Obligation, or Annuity, or Rent, or Action of Covenant, or an Assise upon a Disseisin, *Ejectionis firme*, upon an ejectionment, a Ravishment of Ward, upon the detaining of a Ward, Trespas of goods taken away, Bearing, or the like; a Right, or Title of entry into Land: And because they are things, whereof a man is not possessed; but for recovery of them, is driven to his Action, or other remedie; they are called *Things in Action*, or the possibility of a thing. And this is either Certain, when the demand is certain, as in case of Debt; or Incertain, when the demand is of a thing incertain; as in Action of Trespasse, and the like. And these *Choses in Action* are also; some of them, personall, as Debt, Damages, and the like; and some of them are mix'd, as Wardships; and some are Reall, as Rights, titles of Entry, or Action, and the like, *Finches ley foli. 27.*

Chose en Actiō,
what it is.

The kinds of it,

These things in Action, causes of Suits and such like things, as Entries to continue ones right, or upon a Title; possibilities, are of that nature as that regularly they cannot be given or granted, nor yet transferred from one subject to another by act of Law. As a right of Action will not come to the Lord by *Escheate*; and if an Obligation had beene made to a Villaine, and the Lord seise him; hee shall not have, nor can recover this debt but in the Villaines name; nor yet be given or granted by act of the Partie, from one man to another. And therefore if a man have a debt due by Especialty or otherwise, hee cannot grant or assigne it to another, but hee may depute another to sue it for him, and in his name, or by agreement promise it to any other when it is recovered, or hee may grant give or assign the specialty it self, & so deprive himself of the meanes to recover it (as hath been often adjudged)

The nature of it

but such things may bee extinct by Release or confirmation, &c. but this must bee alwaies between the Parties themselves, for no strangers, but parties themselves, and Parties Heirs, Successors, Executors and Administrators, can take advantage of them, unlesse it bee in speciall cases; as where a man is Executor, or where there is a grant of a Reversion, for which see 32 H. 8. 8. & vide infra; and this the Law doth provide to avoid multiplicity of Suits, and subversion of Justice; which would follow, if these things were grantable from one to another, 1. H. 6. 4. Co. 10. 48. 22. Aff. p. 37. Dyer 306. 39 H. 6. 26. 34 H. 6. 30. Fitz. Main ten 14. Plow. 185. 5.

What shall be accounted, in nature of a Thing in Action, & is grantable; or not.

Whatsoever comes under the definition of Action (for which see Action) or is a Chattell only (in Action) for which see above; as all causes of Suit, for any Debt, or Duty, Trespass, or Wrong, is to bee accounted Chose in Action. Also if I have a Judgement against another man for money; or a Statute for money; these are Choses in Action. So also if I have an Annuity to me in Fee for life or yeares, it seemes this is in nature of a Chose in Action, and not grantable; (But *Quare*, see Fitz. Grant 45.) for it seemes, an Annuity in Fee, to mee and my Heirs, is grantable, Co. 5. 89. 90. Bro. Chose in Action, Bro. Annuity 16.

If a man have the Advowson of a Church, and the Church bee void; the presentation to it, is in nature of Chose in Action, and cannot bee granted by a common person: But in the case of the King, it was grantable: But in this case, if the Patron grant the next presentation, when it shall bee next void; the Grantee, it seems, shall have the next avoidance, after this, Dyer 296. Fitz. Grant 50. Dyer 26. Also possibility of an Interest, or Estate in a term of years is somewhat neer, in its nature, to a Chose in Action: and therefore is not grantable from one Subject to another; but this may bee released to privies, and parties in the Estate, Co. 4. 66.

But if one sell to mee, and my Assignes an hundred load of wood, in his wood, to bee taken by my Assignment: This is more than a thing in Action; for it is an Interest, which I may grant over; and if hee refuse to assigne it, I or my Assignes may take it without him. So if one sell me his wood,

wood, in such a Wood (except twenty of the best trees :) and that I shall cut it within two yeares ; this is an Interest in mee grantable over : and if hee refuse to choose his trees in reasonable time, after I have requested him ; I may cut down the wood, and leave him twenty trees. So if one grant me reasonable Estovers in his Wood, to bee taken by the view and delivery of his Bayliffe ; this is an Interest : And if his Bayliffe will not deliver it, after request ; I may take it without him, *Coo. 5. 25. 5 Ed. 3. 64.* And yet all things in actions personall, that are certain ; that are the Keepers of the Liberty originally ; or that shall come by forfeiture from others, as annuities, Debts, Wards, or the like, may by speciall, and apt words, be, by them, by their Perogative, granted to any Subject ; and the Grantee may Sue for the same, in his own name ; albeit there be no words in the Patent, to enable him so to doe ; and the course to sue for them, is in the Exchequer. Also they may grant the presentation of a Church, when it is void, *Dyer 30. Fitz Acc. 16. Broo. Chose in Action 2. 1. 21 H. 7. 19. 36 H. 6. 26. Fitz. Grant 50. 33. H. 8. 39.* Also they may give, assigne, or appoint the Obligations that are made to them, at their pleasure : but so may not a common person. Also they (as it seems) may grant over their Rents and condition of re-entry, for not payment of it, or any other reall, or mix'd *Chose in Action* ; which another may not doe. But where a Reversion is granted within the Statute of 32 H. 8. And if the King had been indebted to others, hee might have assigned over all, or part of a tenth, for a payment of it, to those hee did owe it, or appoint it to bee paid by the Customers, 2 H. 7. 8. *per Huffy. 1 H. 7. 8. Broo. Patent 98. 5 Ed. 4. 8. Des. 38. 43. 6.*

If the King had had cause to have a Writ of Ravishment of guard, or forfeiture of marriage, against the Heir, he might have granted this to another ; But a common person regularly, cannot give, or grant any such *Chose in Action* ; unlesse it bee to the Keepers of the liberty ; which hee may doe by Deed enrolled ; and if hee doe otherwise, such gifts and grants will bee void. And if an Obligee give or grant his Debt and Obligation to another man : in this case hee to whom

it is given or granted, cannot have or recover the Debt in his own name : but hee may cancell the Obligation or deliver it up to the Obligor, *Co. 10. 48. 5. 89. 90. 21. H. 7. 15.*

Wee shall now draw towards an end ; but by the way we must give you a taste of the Pleadings in these Actions.

CHAP. LVIII.

Of Pleading.

Appearance ;
what.

Sec. 1.

THe first thing the Defendant or Tenant, in any Action or Suit, is to doe, is to appeare ; and this is called Appearance, which is defined thus. Appearance is, where a Tenant or Defendant in any Action, doth appeare, and shew himself in person, or by Attorney, in the Court where the Action is sued, to answer the Action, and defend the Suit. And the non-appearance, or sayling to appeare at the day and time the Tenant or Defendant ought to appeare, is called a Default. And this sayler, especially after Imparlanee, is penall to the Tenant, or Defendant that ought to appeare ; unlesse hee bee able to shew some good cause or matter, to excuse himself ; as, That hee was let by water, tempest, or the like : for in this case the rule is, *Non debet quis se periculis & infertunitis gratis exponere vel subicere* : and this is called a sayer of Default ; which therefore, is defined thus. When something is, or may bee said, or done, to save the Default of another, that ought to appeare in any Action : or when a man cometh, after his Default, and sheweth good cause, why hee did it, *F. N. B. 25. 1. H. 6. 4. Finches ley 435. Co. super Litt. 259. Terms of the Law, Fourcher Plow. 18.*

Default ; what

Sec. 2.

Saver of De-
fault ; what.

Essoine : what

Sec. 3.

This Default is sometimes saved, and the delay allowed, by that which is called an Essoine, which is given to the Plaintiffe, or Defendant ; and either of them may have. And this is where an Action is brought, and the Plaintiffe, or Defendant cannot appeare at the next day appointed by the Court, for some reasonable cause of excuse hee hath for his not-appearance ; then hee may alledge this to the Court ; and if it bee good, they will allow his Essoine, and give him further day ; and then his default is saved : And the causes

are

are alwaies one of these five. First, When the party is beyond the Seas. Secondly, When hee is gone in Pilgrimage, to the Holy-Land. Thirdly, When hee cannot come for water, or some other danger. Fourthly, When hee is sick. Fifthly, When hee is in the Publique service. But this is not to bee done of purpose to delay the Plaintiffe, or Defendant, which is called a *Fourching by Essaine*, which is shifting device used, to delay the Plaintiffe or Demandant in a Suit, against two, which are not to answer thereunto, till they both appeare; and the appearance, or Essoine of one, will excuse the others Default, at that day; and they agree, that the one shall bee Essoined, or appeare, the one day; and for lack of appearance of the other, have a day over to appear; and at that day the other will appear, or be Essoined; and he that appeared, or was Essoined before, will not then appear; because he hopeth to have another day adjournment of the party, which then appeared: And this is now forbidden, by the Statutes of *Westm.* 1. chap. 42. *Glocester* ch. 10.

Fourcher what
Sec. 4.

But if a Tenant, or Defendant appeare to an Action, and hath a day over the same term; or is after called the same term, though hee hath no day given him: Now, if in this case hee doe not appeare, but make Default; this is incurable: and for this, the Defendant shall bee condemned; and the Plaintiffe shall recover: and this is called, a *Departure in despite of the Court*, Stat. 12. *Edw.* 2. of *Essoines*. 5. *Ed.* 3. ch. 6. 27. *H.* 6. 1. 9. *H.* 5. 5. 35. *H.* 6. 33. 18. *Ed.* 4. 4. 27. *H.* 6. 2. 21. *Ed.* 4. 16. 39. *H.* 6. 29. 2. *Ed.* 4. 16. *Terms of the Law* 9. *Ed.* 3. 3. *The Womans lawyer*, fol. 218.

Departure in
dispite of the
Court.
Sec. 5.

If one that is arrested by the Sheriffe on a Recognizance, *Capias*, or *Latitat*, get a *Superfedeas*, and deliver it to the Sheriffe; yet hee must appeare after, to save the forfeiture of the Obligation for his appearance: So if one bee bound in a Recognizance for the Peace; the Defendant must appeare, though the Plaintiffe do not prosecute.

Where an Ap-
pearance is re-
quisite, or not,
and when.
Sec. 6.

The party that is to appeare in the Court of Common-Pleas; if the return of the Writ bee on an ordinary day; as *Octabis Michaelis*, or *crastino Animarum*, or the like hath four dayes after *insolvitur*: But if the return be on one of the dayes

dayes of the week incertain ; then it seems, hee must appear the very day in person, or by his Attorney ; and hee shall have no longer time, *Frost versus Hervey M.9. Jac. Dyer 257. 39 H.6.26 Westm.2.chap.10.12 H.4.24.*

Count, or Declaration.
Sect. 7.

The next thing to bee done, after the Tenant or Defendant hath appeared, in any Action, is to shew the cause of Action, or matter of complaint, which is by the Count or Declaration.

What.

And this is the shewing, in writing, of the grieve and complaint of the Demandant or Plaintiffe, against the Tenant, or Defendant ; wherein hee supposeth to have received wrong : And then it is properly called a Count, when it is in a reall Action ; and then a Declaration, when it is in a personall Action. *Terms of the Law*, wherein observe these things. First, This, for the most part is, and must bee more spacious than the Writ : (But in *Audita querela*, the Count and Writ are all one, by common practice ;) For it must contain divers things ; that is who complaineth, and against whom, and for what matter, how, and in what manner the Action grew between the parties, and what time, and place the wrong was done ; and in conclusion, hee must aver, and

infra 334.

profer to prove his Suit, and shew the damage which hee hath sustained by the wrong done unto him, *Finches ley 356. Coe. super Litt. 17.* Secondly, This ought to have in it three things, Perspicuity, Verity, and Certainty ; because it is the foundation of the Suit, and is that which impeacheth the Defendant ; and that whereto hee must answer ; and upon which the Court is to give Judgement. But note here three kinds of Certainities. First, To a common intent ; and that is sufficient in a bar, which is to defend and excuse the party. Secondly, To a certain intent in generall ; as in Counts, Replications, and other pleadings of the Plaintiffe ; and in Indictments, &c. which is to convince the Defendant. Thirdly, To a certain intent in every particular, as Estopples, *Plow. 121. 122. Coe. super Lit. 303. Coe. 5. 120.* Thirdly, Declarations shall bee good, if they have matter of substance, though the terms be not apt, *Stat. 36 Ed. 3. ch. 15.*

General Rules concerning this
Sect. 8.

First, The Count must bee agreeable, and conforme to the writ, the Bar to the Count, &c. and the Judgement to the Count ;

Count; for none of them must be narrower or broader than the other, *Coo. super Lit. 303.*

Secondly, The antient form of Counts, are duly to be observed.

Thirdly, The Counts, or such as be in the nature of Counts, *supra* as Avowries, need not be averred.

Fourthly, Where a matter of Record is the foundation or ground of the suit of the Plaintiff; there it ought to be certainly and truly alleged: But otherwise it is where it is but the conveyance only.

Fifthly, A Count ought to have three certainties. First, Sufficient certainty, whereupon the Count may Judge. Secondly, Sufficient certainty, to which the party may answer. Thirdly, Sufficient certainty, upon which an issue being joyned, the Jury may give verdict without being inveigled. *Coo. 5, 29. 3 Ed. 4. 21. Plow. in Partridge case.*

After a Suit is begun, and the party that is Plaintiff hath declared; hee must continue his Suit from day to day, and from Term to Term; else the adverse party may take advantage of it: and this is called, a *Continuance*; which is nothing else, but the proroging of a Suit from time to time, to keep it in being: And this is sometimes by the Act or Order of the Court; and sometimes, by the act or agreement of the parties, *F. N. B. 154. F. 7 H. 6. 39. Finches ley 66.*

In the first case it is called a *Dies datus*; that is, when the Court doth give the parties further day and time. In the last case, it is said to be, *Prece partium*; or, *ex assensu partium*; that is, when the continuance is by assent and agreement of both parties.

The proroging of a Suit by the Court, is sometimes by adjournment; which is, when any Court is dissolved, and determined, and assigned to be kept again, at another place, or time: And sometimes it is by *Imparlance*, which is defined to be a Petition in Pleading, in any Suit by the Defendant or Tenant, after the Declaration put in, and an order of the Court thereupon to imparle; that is, to have a longer and further day, to answer the matter: and this may be also *ex assensu partium*, by agreement. And this is either generall or

Journies Account.

Sec. 11.

Darrein continuance; what.

Discontinuance; what.

Sec. 12.

Miscontinuance; what.

Retraxit; what.

Sec. 13.

Non-suit; what.

Sec. 14.

Abridgment of the Plaint or Demand; what.

Sec. 15.

And sometimes it is by *Journies Accompt*; which is also, a kind of continuance of a Suit; begun and interrupted, *Bro. default* 34. *Finches ley* 67. 18 H. 8. 6. *Terms of the Law*, 7 H. 6. 39. 4 H. 6. 67. 16 Ed. 4. 4. 13 H. 7. 17. *Coo. 6. 10.*

The last day of this prorogation of the Suit is called, the *Darrein continuance*; which is the last time of the prorogation, or continuance of the Suit, that the Law gives to the partie: and after this, regularly he can plead nothing. *Kitch. 199. 102.*

And if the Suit bee not thus continued, it will bee discontinued; and that is called, a *Discontinuance*; which is the interruption, or breaking off a Suit; which being done, the Plaintiff is without a day; and must begin his Suit anew. So also if the Suit bee continued, but not well continued, which is called, a *Miscontinuance*, and produceth the same effect as a *Discontinuance* doth; for, by this, the Suit will bee determined, *Coo. 11. 38. Finches ley* 431. *Coo. super Lic. 345.*

And as the party may determine his Suit negligently (as in the cases before:) So also may hee end it willfully, and that two wayes; either by *Retraxit*; which is, where the Plaintiff or Demandant in person cometh alone, or with the Defendant in Court, and sayeth, Hee will proceed no further; and this is peremptory and a perpetuall bar, and may bee pleaded as a bar to the Plaintiff in any other Action, for ever: Or by *Non-suit*, which is, when the Jury is ready to appear, or to give up their verdict; or when the parties have demurred in Judgment, and have a day over given them; and at that time the Plaintiff or Demandant being called, doth willfully make default, & renounce his Suit: and this is alwaies after appearance, *Coo. 8. 58. Coo. 10. 135.*

This is, where one bringeth an *Affize*, *Writ of Dower*, *Writ of Ward*, or such like, wherein the writ is generall, without shewing any certainty: But in the Declaration, the Plaintiff or Demandant is to shew the certainty of the Acres or parcells of land; then if the Tenant pleadeth *Non-tenure*, or *Forfeiture*, or some other such like Plea, to parcell of the land demanded in abatement of the Writ; The Plaintiff or Demandant may abridge his Plaint or Demand to that parcell (that is) leave out that, and pray the Tenant may answer.

answer to the rest, *Terms of the Law* 21 H. 8. chap. 3.

Pleadings, taken largely, doth signifie all the sayings of the Parties to Suits or Actions reall, personall or mixt, after the Count or Declaration (that is) that which is contained in the Barr, Replication and Rejoynder, Surrejoynder, &c. which sometimes is called the Entry: But sometimes it is taken more strictly, and then doth signifie the Answer or defence of the Defendant, to the Count or Declaration of the Plaintiff; And this is sometimes called the Plea or Defence; and sometimes also (as it seemes) *Exception* (see beneath) and if it bee such a one as destroyeth the Action of the Plaintiff for ever, than it is called a Barr. And in this last sense it is sometimes generall, and sometimes speciall. The generall Pleas are, *Non sum Infirmus. Non culpabil. Riens arere. Nil debet*, and such like. The speciall Pleas are manifold, as per *Duresse, per minas*, and the like, as the Case is, *Terms of the Law, Finches ley, 359. Plow. 343. Coe. super Lit. 303.*

Pleading; what
Sect. 16.

Plea or De-
fence; what.

It is when the Defendant in any Action pleadeth a Plea which is a sufficient answer, and destroyeth the Action of the Plaintiff for ever. And this is distinguished into Barr to common intent, or at large, and Barr speciall or materiall. Barr to common intendment, is an ordinary and generall Barr which commonly disableth the Declaration or shewing of the Plaintiff. Barr speciall, is that which is more then ordinary, and falleth out in the case in question upon some speciall circumstance of the Fact. As an Executor being sued for the debt of his Testator, pleadeth that hee hath nothing in his hands the day of the Writ purchased; this is a good Barr at the first sight; but the Case may bee so, that more goods may come to his hands after; which if the Plaintiff can shew by way of Replication, then, except the Defendant have a more speciall Plea to alledge, he must bee condemned in the Action, *Terms of the Law, Plow. 26. Kitch. 68. Coe. super Lit. 372.*

Barr; what.
Sect. 17.

Some Barrs also are peremptorie or perpetuall, that is, such as doth and will for ever overthrow the Action of the Plaintiff. And some are onely temporarie (that is) which for the present doe overthrow, or at least interrupt the Action, but afterwards they fail; As a *plene Administravit* is a good Plea,

untill it doth appear that more goods are come to the hands of the Executors, *Broo. Barre 23. Terms of the Law.*

*Non sum Infor-
matus*; what.

It is a formall Answer of course, made by an Attorney in any Suit which by order of Court is to answer, whereby hee is deemed to leave his Clyent undefended, and so Judgement passeth for the adverse partie, *Book of Entries.*

Nil debet; what.

It is a generall Answer used to an Action of Debt without specialtie, whereby the Defendant doth alledge that hee doth owe the Plaintiff nothing, *Book of Entries.*

Non cul; able; what.

Nat-Guilty, is a kind of Plea used to Actions of Trespas, or the like, whereby the Defendant doth absolutely deny the Fact wherewith hee is charged, *Book of Entries.*

Riens Are; e; what.

It is a kind of Plea used to an Action of Debt upon Arrearages of Account, whereby the Defendant doth alledge, that there is nothing behinde, *Books of Entries.*

Rules concern-
ing Pleading.
Sect. 18.

As to Pleading in generall these things are to bee known.
First, The Pleadings in the Courts at *Westminster* must bee entred in Latin, *Stat. 36 Ed. 3. chap. 15.* In an Action upon the Case the Count was in English, and therefore it was awarded that it was vicious, and all the Proceedings erroneous, *per cur. Pas. 9 Jac. B. R. Receipts Case.*

Secondly, Good matter must bee pleaded in apt time and in due order, otherwise great advantages may bee lost, *Coo. super Lit. 303.*

Thirdly, That which is alledged by way of inducement or conveyance to the substance of the matter, need not to bee so certainly alledged, as that which is of the substance it self, *Plow. 81. Coo. super Lit. 303.*

Fourthly, Matters of Records, most commonly, must bee certainly and truly alledged. But the Proceedings and Sentences in the Ecclesiasticall Court may bee alledged summarily, *Coo. idem.*

Fifthly, Generall Estates in *Fee simple* may bee generally alledged; but the commencement of Estates in tail, and other particular Estates, must be shewed; unless it bee in some cases, where they are alledged by way of inducement; and the life of Tenant in taylor for life, ought to bee averred. *Coo. idem.*

Avcrred.

Sixthly, When any speciall and substantiall matter is alledged by

by either partie; that ought to be especially answered, and not to bee passed over by a generall Pleading, *Coo. idem.*

Seventhly, The Pleading of every man shall bee taken most strongly against himself; for every man is presumed to make the best of his one case; *Coo. idem.*

Eighthly, When a man is authorized to doe any thing by the Common-Law, by Grant, Commission, Act of Parliament, or custome; hee ought to pursue the substance and effect of the same accordingly, *Coo. idem.*

Ninthly, When a Count, Declaration, Barr, Replication, &c. is defective in respect of omission of some circumstance of time or place, &c. there it may be holpen and made good by the Pleading of the adverse partie: but if it bee insufficient in matter; it cannot bee salved, *Coo. idem.*

Tenthly, That this is apparent to the Court by necessary Averment, collection out of the Record, need not to bee averred.

Eleventhly, Hee that Pleadeth in the affirmative must shew the matter and the manner; (that is) hee must Plead certain-
tie, 22 *Ed. 4.* 40.

Twelfthly, That which is issuable, ought to bee pleaded cer-
tainly, *Kitch.* 228. 229.

First; Where a thing rests in mine own notice, I must Plead Where general
this particularly; otherwise not, 14 *H. 4.* 15. 2 *Ed. 3.* 17. 19 *H.* Pleading suffi-
6. 32. 78. 21 *Ed. 4.* 78. 12 *H. 8.* 6. ceth; & where
not.

Secondly, Where one comes in by Act in Law, the generall allegation sufficeth, 10. *Rep.* 94. 3 *H. 6.* 10. 35 *H. 6.* *Monstrans*
de fait. 118. 11 *H. 4.* 83. 44 *Edw. 3.* 26. 13 *H. 7.* 14.

Thirdly, Things spirituall may bee Pleased generally, 11. *H.*
7. 27. 12 *H. 8.* 6.

Fourthly, Where the Plea consists of matter *inquire*, it may
bee pleaded generally, 5 *Ed. 4.* 8. 10 *Edw. 4.* 5. 2 *H. 7.* 15.

This word doth sometimes signifie a stop or a stay to an Exception;
Action; and is (as it seems) applyable to some kinde of Plea what.
only. And this is sometimes *Dilatorie*, which is nothing else Dilatorie Plea;
but a *Dilatorie* Plea; and sometime *Peremptorie*; but most what.
commonly it is used in our Law to another purpose; for which
read the *Tract of Exceptions*, in my Book of *Common Assu-*
rances, *Coo. super Lit.* 303. *Bract. lib.* 5. *Tract.* 5.

Abatement
whar.
Sect. 10.

This word hath a double acception in our Law; for sometimes it is applyed to an Entrie; and for this see in *Ejectione firme*.

And sometimes it is applyed to a Writ or Plaint; and then it is defined to bee, when an Action is brought by Writ, Plaint, or Aoywry, and there is some cause of abatement: Then the Defendant finding fault herewith, may pray that the Writ, or Plaint, may abate; that is, that the Plaintiffs Suit, for that time, may cease: and then the other may begin again, if hee will. *Terms of the Law*, *Coo. super. Litt.* 277. *Coo. 6. 64. 8. 61. 9. 33.*

Causes of Abatement.

And the causes of abatement of a Writ, or Plaint, are either by act of God; as where the Plaintiff or Defendant is dead: or by act of the parties; as when there appeareth in the Writ or Declaration, or both, want of sufficient and good matter: Or when, though it be good, yet it is not certainly alleged, or name of the Plaintiff, or Defendant, or place is mistaken: Or where be variance between the Writ, Especialtie, or Record: Or apparent repugnancy: Or incertainty in the Writ, Count, or Declaration, 18 *Ed. 3. 27.*

But if the Defendant doe first plead a Plea, that doth tend to the destruction of the Action for ever; hee shall not be admitted after to Plead in abatement of the Writ. And yet, if there appear matter apparent in the Record, for which the Writ ought to bee abated; then the Defendant may shew it to the Court in arrest of the Judgement, *Terms of the Law*, *Coo. super. Litt.* 277. *Coo. 6. 64. 8. 61. 9. 33. 18 Ed. 3. 27.*

Faint Pleading; whar.

It signifies a false, Covinous or Collusory manner of Pleading to the deceit of a third party: and it seems, that heretofore the Sheriffs of Counties, and Bayliffs of Franchises, did give licence for such false and deceitfull Pleading in the County-Courts, and Courts of other Lords, and did use to take of them a fine for it; and that for restraint of this, the Writ called *Bon Pleader*, was given; which is a Writ in the nature of a Prohibition; and lyeth for the County or Hundred (as the grief is) against the Sheriff or Bayliff that taketh or demandeth this Fine, to forbid him so to doe, *Terms of the Law*, *Bon Pleader*, *F. N. B.* 270.

Bon Pleader;
whar.

It is a fained matter which the Defendant or Tenant useth in his Barr, when an action of Trespas or an Assise is brought against him, in which hee giveth the Plaintiff or Demandant a shew, at the first sight, that hee hath good cause of Defence, where in truth is none, but only a colour or face of a Cause, and it is used to this end, To bring the action from the determination of the Jury, to the determination of the Judges; and therefore it is alwaies of a matter in Law; and that which is doubtful to the common People. As when in Assise the Defendant doth pretend and insist upon the grant of a Reversion without Decidior without Attornment: Or if in action of Trespas, for taking away the Plaintiffs Beasts, the Defendant Pleadeth, That before the Plaintiff had any thing in them, hee himself was possessed of them as of his own proper goods, and delivered them to *AB*, to deliver them to him again when, &c. and *AB* gave them to the Plaintiff, and the Plaintiff supposing the property to be in *AB* at the time of the gift, took them; and the Defendant took them from the Plaintiff, whereupon hee hath brought the action. This is a good colour, *Termes of the Law, Doctor and Student lib. 2. ch. 43. Co. 10. Doctor Leyfeilds Case.*

Colour what.
Sect. 21.

It is a refusall of the Judge, as incompetent because the matter in hand was not within his Precincts. It is also taken for such a Plea pleaded by a Prisoner arraigned for Felony of a matter done in a foreign County, as whereof the Judge before whom hee is tryed may not have Conusance, nor is triable nor determinable before him, but must be tryed in a foreign County, *Termes of the Law, Stat. 4 H. 8. ch. 2.*

Forrein Plea
what.
Sect. 22.

It is where a Tenant or Defendant pleadeth in any action a Plea in which beee two matters, and either of them a sufficient Barr to the action, which the Court will not admit, but put him to amend it, unlesse they beee such as one of them do depend upon another, and then if hee may not have the last without the first, both may beee admitted. But when the issue is taken by the Plaintiff upon the one; hee cannot have the advantage of the insufficiency of the Plea; for then hee hath waived the other, *Termes of the Law, Keln. 37. Co. 11. 52.*

Double Plea
what.

These are words of art in Pleading, when the Defendant in his

Mode & for-
ma; what.

Coh. l. 4. 126.
a.

Negative preg-
nancy; what
Sect. 23.

Protestation;
what.
Sect. 24.

his answer or Plea, denyeth himself to have done the thing laid to his charge, in the manner and form declared. And where the issue taken goeth to the point of the Writ, or Action; there these words are but words of forme: but otherwise it is when a collaterall point in Pleading is traversed; as if a Feoffment bee alledged by two, and this is traversed *modo & forma*, and it is found the Feoffment of one; there these words are materiall. *Kitch. 232. Co. super Lit. 281.*

It is where an Action, Information, or other Suit is brought against one, and the Defendant pleadeth in bar of the Action, or otherwise, a negative Plea; which is not so speciall an answer to the Action, but that it includeth also an affirmative. As for example: If an Information bee brought in the Exchequer against *J. S.* for that hee bought wooll between the shearing-time and the Assumption, such a year, of *J. N.* and the Defendant say, hee did not buy it of *J. N.* as it is alledged, &c. this is such a Pleading; for if hee bought it of any other, yet hee is guilty of buying, *Terms of the Law.*

It is a forme of Pleading where one will not directly affirm, or deny any thing which is alledged by another, or by himself; and it is in two sorts: One, when a man pleadeth any thing which hee dare not directly affirm; or that hee cannot Plead, for fear to make his Plea double. As if in conveying to himself (by his pleading) a title to any land hee ought to plead divers descents by divers persons, & he dare not affirm that they were all seized at the time of their death; or although hee could doe it; it shall bee double to plead two descents of both, which every one by himself may bee a good Barr; Then the Defendant ought to plead and alledge the matter, interlacing this word *Protestando*, as to say, That such a one dyed (by Protestation) seized, &c. and that the adverse party cannot traverse. Another is, when one is to answer to two matters, and yet by the Law hee ought to plead but to one; then in the first part of the Plea, hee shall say to the one part of the matter *Protestando & non cognoscendo*, this matter to bee true; and makes his Plea further: *Sed pro placito*, &c. and so hee may take issue upon the other matter; and then hee is not concluded by any of the rest of the mat-

ter

ter hee hath by Protestation denyed ; but that hereafter hee may take issue upon them, *Terms of the Law, Finches ley 359. Co. super Litt. 124.*

¶ These are words of art, which are used in pleading to an Action of Trespas, or the like, for a direct justification of the very Act complained of by the Plaintiff, as a wrong. For example : In an Action of the Case the Plaintiff saith, That the Lord threatned his Tenants at will in such sort as he drave them to give up their Tenures ; the Lord for his defence pleadeth, that hee said to them, That if they would not depart, hee would sue them as the Law would, *Que est mesme* (that is) which is the same threatning, *Kirch. fol. 226.* *Que est mesme* what.

It is a manner of pleading in the Plea of Count, or else-where, whereby a man intituling another to Lands, &c. saith, That the same estate that hee had himself, hee hath from him : As for example : In a *Quare impedit* the Plaintiff alledgeth, That such four persons were seized of Lands, whereunso the Advowson in question was appendant in Fee, and did present to the Church, and afterward the Church was void *Que estate del, &c.* that is, which estate of the four persons, hee saith also, that hee hath now, during the vacation, by virtue whereof hee, &c. *Broo. tit. Que estate.* *Que estate* ; what.

It is a phrase of speech used where one pleadeth some matter, by which hee sheweth the Plaintiff had no cause to have the Writ which hee brought ; and yet it may bee hee may have another Writ or Action, for the same matter : And if the Plea bee such, as thereby it appeare the Plaintiff have no cause of Action at all, for the thing demanded ; then it shall bee called a *Plea to the Action, Terms of the Law.* *Action del Brieve* ; what. Sect. 25.

It is a form of pleading used in case where the Defendant is sued for a Debt or Duty, which should have been paid at a day past, and the Obligor did tender it at the day, and the partie was not by himself or other there present, to receive it : Now if in this case the Plaintiff doe after sue for this money, or duty ; the Defendant must plead this tender, and say in the conclusion of his Plea, That hee is *uncore prist* (that is) still ready to pay it, or to tender the thing ; and this will save the Defendant from the penalty of the Obligation : And

if now the Plaintiff will not take it, but take issue upon the recorder, and it be found against him; he loseth his money, and is remediless for it, for ever, *Coo. super Litt.* 207. *Kelw.* 74. *Dyer* 83.

Traverse; what. This word hath a double signification; for sometimes it signifies to overthrow or undo a thing that is done; And then is most commonly applyed either to an Office; and then is to prove, that an Inquisition taken of goods or Lands by the Escheator, is defective, and untruly made: So traversing of an Indictment, is to take issue upon, or deny the chief matter thereof; as in a prosecution against *A.* for a high-way over-flown with water, for default of scowring a Ditch, which hee and they whose Estate he hath in certain Land there, have used to scower and cleanse: *A.* may traverse either the matter, and say, That there is not any high-way there; or that the Ditch is sufficiently scowred, or the cause; and say, That hee hath not the Land, &c. or that he and they whose Estate hee hath, have been used, &c. And sometimes it doth signifie no more but to deny a thing, which is usually in this forme, *Ab/que hoc, &c. Terms of the Law, Kirch.* 140. 227.

Confesse and avoid; what.

It is a form of pleading when the Defendant doth by his answer, confesse the effect of the charge of the Plaintiff; but by some new matter, doth avoid it and put it from himself, *West. presid.*

Conclusion of the Plea, what.

It is the latter part of a Declaration, Barr, or Replication, which must bee apt according to the nature of the matter contained therein; as in Barrs, Replications, Rejoynders, and Surrejoynders, the party must conclude *& hoc paratus est verificare, &c.* And if the Action bee brought upon an Especialty, and the Defendant plead hee is *niem litterd*, and that it was otherwise read to him than in truth it was; hee must conclude *Judgment si fait*; or, *Rient son fait*: But when to a Debt or Obligation, hee doth plead payment and delivery of the Obligation; hee must conclude *Judgment si Action*, *Finches Law* 359. *Plow.* 343. *Kirch.* 219. 220.

Rules concerning the Plea in particular.
Secd. 26.

First, Every Plea must bee direct, and not by way of Argument or reherfall. And every man shall plead such Pless as are pertinent for him, according to the quality of his case. *Coo. super Litt.* 303.

Secondly,

Secondly, In good order of pleading, a man must first Plead to the Jurisdiction of the Court. Secondly, To the person, and therein first to the person of the Plaintiff, and then to the person of the Defendant. Thirdly, To the Count. Fourthly, To the Writ. Fifthly, To the Action, &c. and if the Defendant mis-order any of these ; hee loseth the benefit of the former, *Coo. super Litt.* 303.

Thirdly, Hee that pleadeth a Plea in abatement of the Writ, or a Plea after the latter continuance, ought to Plead it certainly, *Coo. idem.*

Fourthly, After Imparlançe one may plead in bar, or to the Action ; but one cannot Plead to the Jurisdiction, Misnomer, or to the Writ, or in abatement of it ; except the thing happen after the continuance, and it bee abated, as by death. So neither then can the Defendant have *Oyer* of the Deed except he plead Variance ; or that the Writ was brought in another County then where the Writ was brought, 7 *H.6.16.39.* 18 *Ed.4.19.44 Ed.3.4.39 H.6.22.27.38 H.6.7.2.*

After the darrein continuance, the Defendant can have but one Plea, and such a one as was in being at the time of the first Plea ; and this hee may Plead after issue joyned, and in another Teatm till the verdict ; but not in the interim between the *Nisi prius* and day in Bank ; and so hee may plead a Plea by which the Writ is abateable ; not by which it is abated, 28 *H.6.1.9 H.7.9.16 Ed.4.5.8 H.4.9.*

Fifthly, Where there is but one Tenant or one Defendant, hee cannot have two such Pleas, as each of them doe go to the whole ; but where there are divers, each of them may plead severall Pleas which extend to the whole, *Coo. idem.*

Sixthly, Every Plea that a man pleadeth ought to bee triable, otherwife the Cause can receive no end, *Coo. idem.*

Seventhly, The Tenant before his Default saved, may plead all Pleas which prove the Writ abated, as Death, &c. or matters apparent in the Writ ; but no Plea which proves it abateable, as taking of husband, &c. *Coo. idem.*

Eighthly, Surpluage shall never make the Plea vicious, but where it is contrary to the matter before.

Ninthly, In many cases the Law doth allow generall pleadings

things for the avoiding of tediousnes, and the particular shall come on the other side : As if a condition of an Obligation be to performe all the Covenants in an Indenture ; if all the Covenants bee in the affirmative, hee may generally plead performance of all : But if any bee in the negative ; to so many hee must plead specially. So if any of them bee in the disjunctive, hee must shew which of them hee hath performed: So if any are to bee done upon Record, hee must shew them specially, *Coo. idem* 8. 133.

Tenthly, Pleadings which amount to the generall issue, are not to bee allowed ; but the generall issue is to bee entred, *N.B. of Entries* f. 24.

Eleventhly, The Barr need not any answer to idle and superfluous things alledged in the Count, *N.B. of Entries* fol. 24.

Twelfthly, When the conclusion of a Plea, & *issint & sic*, is in the affirmative, it shall not waive the speciall matter : But where the conclusion is in the negative, there regularly the speciall matter is generally waived, *Coo. idem*.

Thirteenthly, Where speciall matter is pleaded, and the conclusion, & *sic*, is to the point of the Writ or Action, the speciall matter is waived.

Fourteenthly, The Plea must bee single and certain ; for the Plea that doth contain duplicity or multiplicity of distinct matter, to one and the same thing, whereunto severall answers (admitting each of them to bee good) are required ; is not allowable, if it bee peremptory and perpetuall : But if it bee only dilatory, it may at sometimes bee used : And upon the generall issue pleaded, the parties may give in evidence as many matters as they will, *Coo. super Litt.* 304. *N. Book of Entries* fol. 21.

Fifteenthly Each Plea ought to have his proper conclusion ; as a Plea to the Writ, for to conclude to the Writ ; a Plea in Bar for to conclude to the Action ; an Estopple for to rely upon the Estopple : & so of the like, *Coo. super Litt.* 303.

It is an exception of the second degree, made by the Plaintiff, upon the first answer of the Defendant, or the Plaintiffs speech or answer to the Defendants answer. And the next degree is a Rejoynder ; which is the answer which the Defendant.

Replication ;
what.

Sect. 27.

dant maketh to the Replication of the Plaintiff. And the next degree is if the parties go so far in pleading, a Surrejoinder ; which is defined to bee a second defence of the Plaintiffs Action, opposite to the Defendants Rejoinder. And every one of these must bee a sufficient answer to the matter objected by the adverse partie, and follow and enforce the matter offered by him that doth Plead in his pleading before. Such partie must take heed of the ordering of the matter of his pleading, lest his Replication vary & differ from his Count, or his Rejoinder, from his Bar ; for this is not sufferable ; and it is called a *Departure in Pleading* ; & is when the second Plea Departure ; doth contain matter not pursuant to the former, and which what. doth not fortifie the same. As for example : If in assise the Tenant doth plead a descent from his father, and doth give colour, and the Demandant doth intitle himselfe by a Feoffment from the Tenant himself ; and then the Tenant saith that Feoffment was upon Condition, and saith the Condition is broken : But in Assise, if the Tenant Plead in Barr, that 7. S. was seized, and enfeoffed him, &c. and the Plaintiff sheweth that hee himself was seized in Fee untill by 7. S. dis-seized, who enfeoffed the Tenant, and hee re-entred, and the Defendant plead a release of the Plaintiff to 7. S. this is good, *Coo. super Litt. 304. 5. 31. Plow. 7. 8. Terms of the Law.*

This is a kind of Replication to an answer : as for example : When the Tenant in Dower, or by the Courtlesie, doth pray in aid of the Keepers, &c. or him in Reversion, for his better defence : or else if a stranger to the Action begun, desire to bee received, to say what hee can for the safeguard of his Estate ; that which the Demandant replyeth or alledgeth against this request, why it should not bee admitted, is called a *Counter-Plea*, *Broo. Counter Plea.* Counter-Plea ; what.

First, Replication ought not to depart from the Count, Rules for a *Coo. super Litt. 303.* yet one may Count of a gift in tayl, Replication. and maintain this in his Replication, by a recovery in value, Sect. 28. because hee cannot have any other Count, *Coo. super Litt. 304.*

Secondly, In a Replication the conclusion must bee, if it bee in the affirmative (*& hoc paratus est verificare*) *Coo. super Litt. 303.* otherwise if it bee meerly in the negative.

Thirdly, Where the Bar is ill in substance, it may not be made good by the Replication, 8 Rep. 120.

Fourthly, Where the Bar is ill in circumstance, it may be made good by the Replication, 6 H. 7. 10.

Fifthly, When it appears by the Replication, that the Plaintiff hath no cause of Action; there hee shall not have Judgement, though the Bar be insufficient in matter, 8 Rep. 120.

Sixthly, When the Bar is insufficient in matter, or amounts to the confession of the point of the Action, and the Plaintiff replies, and shews the truth of his matter to enforce his Case, and in Judgment of Law it is not materiall; yet the Plaintiff shall have Judgement, 8 Rep. 120.

Seventhly, When the Replication doth neither confesse and avoid, nor traverse the matter of the Bar, it is naught, and the Plaintiff may demur to it, and assign this, *new book of Entries*, f. 14.

*De son tort de-
me/me, &c.
what.*

These are words of Art used in an Action of Trespasse, by way of Reply to a Plea of the Defendants. As for example; If *A* sue *B* for Trespasse, and *B* doth answer hee did it by the command of his Master, and *A* doth Reply that *B* did it *de injuria sua propria, &c.* that is, of his owne wrong, without any such Cause; and this is admitted only in case where the Plea of the Defendant doth consist of matter of excuse, and not where he maketh any interest, *Terms of the Law*, Co. 3. 67.

*Novell Assign-
ment, what.*

It is a formalitie in Pleading, that is, the Assignment and setting downe of time and place, or some such like thing, in Pleading, otherwise then it was before Assigned, which is used in Case where the Defendant in his Pleading doth justify the doing of a Trespasse in another place then that the Plaintiff doth speak of, and doth give another name to the place then hee doth mention in his Declaration: Then the Plaintiff, must in his Replication assign and set forth a place certain wherein the Trespas was committed: And therefore if the Defendant say the Trespas was in six acres of Land, and that those six acres are his Free-hold; the Plaintiff may reply, That it is his Free-hold, and not the Free-hold of the Defendant; And then if the Plaintiff have six acres there, and the Defendant six acres there; the Defendant cannot give in Evidence, That this

Trespasse

Trespasse was in his six acres, *Broo. Trespasse*. 112. *Dyer* 33. 147. 27 H. 8. 7.

It is when the Parties to any suit in Pleading, have proceeded so farr that they have joyned issue, which shall be tryed or is tryed by a Jurie or Inquest, and this issue is so badly joyned that it will be Error if they proceed ; Then some of the Parties may be their Councell shew it to the Court as well after Verdict and before Judgement, as before the Jury bee charged (But divers of these defects are now helpen by certain Statutes) for which see *Amendment of 32 H. 8. cap. 30.* And if the Jury bee ready at the Barr when this is first moved, the Court will discharge them, and put the Parties to re-Plead (that is) to Plead again from the place where the defect is, for this is the course in re-Pleading, which is defined to be, Where for some insufficiency in the first Pleading, the party is put to plead again. Therefore if the Bar bee good, and Replication ill ; the Plaintiff shall make a new Replication. So if the Bar and Replication bee good, and Rejoynder bad, and issue bee taken upon that ; there shall be a new Rejoynder : But if the Bar be bad, & the Replication good, and issue taken upon that ; they must plead all again. After demurrer there shall not be any Repleader, 3. *Rep.* 52. *Terms of the Law*, *Finches* ley 397. *Broo. Repleader*, 14 H. 7. 12. 5 H. 7. 29.

Jeofaile ; what.

Repleader :
what.

It is the discussing of a point incidently falling out before the principall cause can take an end. As for example. If two severall persons bee found Heirs to one and the same Land in one County, by severall Offices ; the Keepers of the Liberties, &c. cannot give Livery untill it bee determined who is right Heir : and therefore they must interplead ; that is, try who is the right Heir before they can make Livery to either, *Finches* ley 129. *Stamf. Prerogative* chap. 19.

Ever pleader :
what.

It is the Admission of a third person to plead his right, in a cause formerly commenced by others. As for example. If Tenant for life or yeares, bring an Action, and in this Suit hee in the Reversion doth come in and pray to bee received, to defend the Land, and to Plead with the Demandans ; and thereupon hee is so ; this is a Resceipt, *Broo. Resceipt* *Per* *It* *Dower* 448.

Receipt, what.

Demurrer :
what.

Sec^t. 29.

It signifieth a kind of pause upon a point of difficulty in any Action : when albeit both the parties are agreed about matter in Fact ; yet are they in difference about matter in Law, and the one hath said something in his pleading whereof the other doth take advantage, and saith that hee will go no further, for that the other hath not pleaded sufficient matter against him ; but hee saith to the contrary : and thereupon both parties agree to insist upon that point, and to refer it to the Judgement of the Court : For in every Action the question in difference is either about matter of Fact or about matter of Law. *Ad questionem facti respondent Juratores. Ad questionem legis, Judices.* If the point be easie or the Judge will take upon him to determine it ; then Judgement is given presently : But if it be doubtfull or difficult, then the Judges doe stay and take time (and this is a Demurrer in the Judges) to consider. And if the major part of the Judges of the Court, where the Cause is, cannot agree it there, it must be sent to the Exchequer Chamber, to be decided : And if the major part of all the Judges cannot agree it there, it must be sent to the next Parliament and be decided there, *Coo. super Litt. 71. 72. Terms of the Law, Broo. 199. Dyer 278. Plow. 5. 66. Finches ley 427.*

Of the kinds
of Demurrer.

This is sometimes in Court of Equity, upon the answer of the Defendant, and exception taken thereto, that it is insufficient ; and this is usually referred to some to consider of, and make report ; whereof see in Chancery *chap. 59.* And sometimes it is in the Courts of Common-Law ; and therein it is sometimes upon the Pleading, and sometimes upon the evidence at a Tryall. In the Pleading it is also sometimes upon the Count, sometimes upon the Plea, and sometimes upon other parts of the Pleading. And it may be also upon an *Aid Praier, Voucher, Resceipt, or Wager of Law.* And in all these Cases in Pleading it is, and may be, either generall (that is) without shewing any speciall cause ; or speciall (that is) when hee sheweth some speciall cause of his demurrer, upon which hee doth rely, after demurrer joyned, the Judges shall give Judgement according as the very right of the Cause and matter in Law shall appear, without regard to any want of form

in

in any Writ, Return, Plaint, Declaration, or other Pleading, Proteſts, or courſe of Proceeding; except thoſe only which the party demurring ſhall particularly ſet down in his demurrer, *Coſ. ſuper Litt. 71. 72. 14 H. 4. 31.*

Fiſt, Hee that demurreth in Law, doth confeſs all ſuch matters of Fact, as are well and ſufficiently pleaded to be true, *Coſ. ſuper Litt. 72.*

Secondly, Hee that doth demurr ſpecially, hath waved all other matters of form, and can take no advantage of any other matter of form, but what hee hath ſpoken of: but yet hee may take advantage of any other matter of ſubſtance: ſo is the common practice; and ſo in *10. Rep. 88.*

Thirdly, In ſome Caſes a man may alledge ſpeciall matter and conclude with a Demurrer; As in an Action of Treſpaſs brought by J. S. for the taking of a horſe, the Defendant pleads, That hee himſelf was poſſeſſed of the horſe, untill hee was by one J. S. diſpoſſeſſed, who gave him to the Plaintiff, &c. The Plaintiff ſaith, That J. S. named in the Barr, and J. S. the Plaintiff are all one, and not diverſe perſons, *Coſ. ſuper Litt. 72.*

Fourthly, If the Plaintiff in evidence ſhew any matter of Record, or Deeds, or Writings, or any Sentence in any Eccleſiaſtical Court, or other matter of evidence, by testimony of witneſſes, or otherwiſe, whereupon doubt in Law ariſeth, and the other offer to demurr in Law; now hereupon hee muſt not reſuſe to joyn in demurrer: But if evidence for the Keepers of the liberties, &c. in an Information, or any other Suit bee given, and the Defendant aſter to demurr in Law upon the evidence; the Keepers of the Liberties, &c. counsell in that Caſe, ſhall nor bee forced to joyn in demurrer; but in that Caſe the Court may direct the Jury to finde the ſpeciall matter, *Coſ. 5. 104. Dyer 53.*

Fiſthly, If there bee Demurrer for part and plea for part, he more orderly courſe, is to give Judgement upon the Demurrer fiſt. But it is in the diſcretion of the Court to try the plea fiſt, if it pleaſes the Court, *Coſ. ſuper Litt. 72.*

It is a ſaying, to put in an answer to the Plea of the Plaintiff in an Action, by the day assigned; which if a man doe, *Nihil dicit.*

Judgement shall pass against him; because hee saith nothing to the contrary. And this is alwayes peremptory, and a Bar to the Action for ever, *Finches Law* 428.

Our Subject matter in hand being to point at the proper remedy given in case of wrongs; and what Action by the Law is given to a man for his relief therein, and there being many Cases falling out, wherein a man hath wrong enough, and yet hath no Action or Remedy at all given him by the Common Law, but hee is left to his remedy in Chancery, in a way of Conscience and Equity. Therefore by way of Appendix wee shall add a few things to this point, and shew in what Cases of injury the most proper place of Remedy is in Chancery, by way of Suit there: And then wee will make an end.

CHAP. LIX.

Of the Chancery.

Conscience or Equity, what it is.

Sec. 1.

Conscience or Equity (as our Law takes it) is said to be *Quod Tabitur animi insalubili factis nostri iudicium, a communi iustitie formula quam Deus insculpsit omnibus hominibus, productum, per quod accusatur res mala, & defenditur bona*; And this being aided and assisted by the Laws of God, Nature, Nations, Reason, and our Country, is the Rule by which they goe and proceed in their Courts of Equity to allay, qualify, and temper the rigor, severity and sharpness of the Common Law in some speciall cases; wherein, if it bee strictly observed, it will fall out to bee *Summum jus*, and consequently *Summa injuria*. In these cases there are Courts of Equity appointed; and amongst these especially the Chancery, which is the

the chief Court, *West. Symb. lib. 2. De 16. Adm. tit. 1.*

The Chancery is defined to be a Court of Equity or Conscience, moderating the rigor of other Courts that are more strictly bound to the Letter of the Law, *2 E. 4. 15. 19 E. 4. 2.* In this Court the Lord Chancellor or Lord Keeper, was; now the Commissioners of the great Seal are chief Judges: And herein they, and in their absence, the Master of the Rolls do make Orders and Decrees. And under these there are many other Officers belonging to this Court; as the twelve Masters in ordinary, which are assistants; the Six Clerks, Examiners, Sergeant at Armes, and others: These Commissioners keep the great Seal, and seal all Writs and Patents, *Flam. 438. Crompt. Jur. of Courts.*

This Court is said to have a two fold Power: Ordinary, as in Cases of Traverse, Endowment of a woman, *Stire. for. 1.* to repeal Patents, and the like; and herein the Court is limited, and confined to the Rules of the Common Law, *Caryes Rep. 50. 71.* And extraordinary and unlimited, which is in Cases of Equity, wherein relief is to be had by a Suit here in a way of Bill and Answer: And it is by the Power of this Court, that Commissioners of charitable uses, Bankrupts, and Sewers are issued forth: Also here in some speciall Cases a *Superfidei*, or *Subpoena*, or Priviledge, is granted to discharge a man out of Prison: a *Subpoena* may be had to force witnesses to appear in other Courts, that have no power to call them in, to refuse their knowledge; as in *London*, when the man lives within its Jurisdiction, *Caryes Rep. 37. 43. 44.* So here sometimes, and in some cases Commissions have been granted to examine walters to prove a Child legitimate, to set out meet wayes for passages, to prove Customes, to examine witnesses in *perpetuam rei memoriam*, *Tohill in toto*, *Caryes Rep. in toto*. By way of Bill and Answer it will give reliefe in many cases against, besides, and beyond the Rules of the Common Law in such like Cases as these; as to enforce others to contribute to a charge, by the Common Law put upon one alone, to the which others ought in equity to contribute a part, *Tohill f. 41.* To relieve one against a man that hath falsified and broken his

Chancery.
what it is.
Sec. 2.

Of the power
of this Court
in the generall
Sec. 3.

Trust with him. To relieve one against a man that holds him to extremity, upon an Engagement; as when the Engagement is unreasonable, dishonest, impossible, discharged, voluntarie, and without any consideration; gotten by practice, fraud, or force, or the like. To relieve one against the extremity of a forfeiture; *Totbill* f. 36. 27. To enforce the performance of an Agreement, to which by Law a man cannot bee compelled, *Totbill* 4. 69. To have the Tution of a Child that doth belong to him; *Caryes Rep.* 96. 97. To force an Enrollment of a Deed, if need bee; *Caryes Rep.* 97. To recover a liberty of common fishing or the like, and upon every interruption and an Affidavit thereof, an Attachment may bee had, *Caryes Rep.* 104. To restrain other Courts that take upon them a greater Jurisdiction then they have, and to remove the Suit into this Court; which may bee by a *Certiorari*; *Caryes Rep.* 60. 56. 48. 65. 68. 73. 74. 82. 84. 85. 89. 90. 92. 99. 96. 97. 99. 102. 109. 37. To stay the proceedings of other Courts when they are unjust, *Caryes Rep.* 73. To enforce obedience to the Decrees of the Provinciaall Councils, Court of Requests, and some other Courts, when by contumacy they are disobeyed. To reduce the generall Customes of a Mannor to a certainty between the Lord and Tenants, or the Tenants themselves, *Caryes Rep.* 21. To recover and settle Land or Monie given to charitable or pious uses, and misemployed, *Totbill* 27. 28. To force a man to give his wife Alimony (i) Maintenance, *Totbill* 93. 94. To force Creditors to take a reasonable composition of their Debtor, hee being disabled, *Totbill* 47. To ascertain and stint Common; *Totbill* f. 36. 37. To ascertain and set out a way, *Totbill* f. 23. To ascertain, to distinguish a mans land when it is compounded and confounded with another mans, *Caryes Rep.* 16. especially when it is to pay Debts, or the like, 14. *Fac.* So when Free-land or Coppy hold land, are confounded, it will distinguish; or if it bee lost, give a recompence for it, *Pickeringes case* 5. *Cur.* To ascertain the Fines of Coppyholders, *Totbill* f. 49. To force an Action to bee tryed in any County, *Totbill* 1. To force Executors or others that have monie in their hands, there to lye long, to give security

security or interest for it, *Totbill* f. 6. To examine the probate of a Will, especially if the Will concern land, *Totbill* 139. To recover a Legacy, or force the performance of a Will, *Totbill* f. 24. To recover Tythes in Kind, or monie for it in some Cases, *Totbill* 68. 184. 185. To recover ones Land, Debt or Duty, although hee have lost conveyance or writing, by which hee should make his title to it, or otherwise bee without remedie at Law for it, *Totbill* 81. 6. To force a man that hath taken monie for Land, assured by defective conveyance, to make the same perfect and good, *Totbill* f. 14. 3. 42. To force a Tenant to Attorn to perfect an Assurance. To force a man to prove payment of monie, agreed and acknowledged to bee given upon a sale of Land *Totbill* 35. *Dyer* 59. And in these and such like Cases, this Court doth alwaies, or for the most part give reliefe. Also in some other speciall Cases this Court doth exercise a Power, as to prevent a disinheri- tance of an Heir, or restore it, *Totbill* 42. 81. Avoid an extinguishment, or suspension of Rent, or Common, *Crompt. Jur.* 49. 50. *Totbill* 42. 188. 137. Prevent an Occupancy, *Hum's case*, 17 *Jac.* *Totbill* 187. Avoid the Barr of an Action; by the Statute of 21 *Jac.* of limitation, *Totbill* 53. 179. Order an Executor to pay a Debt out of course, *Totbill* 53. Make inclosures of Land and Grounds that are common: Give reliefe against the turning of a water-course from a Mill, so as there bee any speciall circumstance in the case; otherwise it is very shie and tender of making Orders in them. But if the substance of the Suit by Bill and Answer bee to overthrow an Act of Parliament made for publique Peace and repose; or to overthrow a fundamentall point of the Common Law; or to overthrow and take from other Courts their particular Jurisdiction, or the like: in such Cases regularly this Court doth not give reliefe, *Totbill* 47. *Crompt. Jur.* 45. So likewise, if it bee such a Case as wherein the Plaintiff hath his remedie at Common Law for the very same thing, hee shall not bee relieved here: But if one promise to assure mee Land for twenty pound, I may either sue at Law for damages, or here for the Land it self. So for a Nuisance,

where the Law gives mee damages, I may sue here to have the Nuisance removed, or the thing it selfe restored, 21 *H. 7* 41. *Caryes Cases* 20. 53. 11. And yet there may bee some speciall circumstances in the Case which may make the Court retaine it, *Caryes Rep.* 71. If the Suit bee grounded on a Will *Nuncupative*, Lease *paroll*, or long Lease, to avoid Wardship, or to establish perpetuities, or to defeate purchasors, or for Brokage or Rewards to make Marriges, or for Bargaine at Play or Wagers, for bargaines for Offices against the Statute of 2 *Ed.* 6. or upon contracts for usury or simony, or if it bee for Land not worth forty shillings a year, or for anything else under the value of ten pounds, these are regularly disallowed here; And sometimes upon notice taken hereof by the Court, upon Motion or upon Affidavit only, before the Cause comes to hearing, it is dismissed: But if not, when it comes to hearing it is dismissed, *Caryes Rep.* 7. 8. 27. 24. 76. yet circumstances may make these retaynable, As if the Suit for so small a matter bee for the poor of a parish, or the like, *Caryes Rep.* 103.

And in these cases the matter being heard upon the Bill and Answer, and the proofes of witnesses, the Judges are (without any regard to forme or mispleading; so as the truth *vis & modo* may bee discovered) to sentence it according to Equitie and Conscience. But wee shall descend to particular illustrations hereof.

All persons able in Law to sue, or bee sued, may sue, or bee sued here; And for this see chap. 3.

Reliefe may bee and is often given against, or for an infant in this Court; As touching which matter these things are to bee know. First, as to Suits against an infant. First, Any infant was compelled to answer to a Bill in this Court, *Hayes case*, *H.* 3. *Jac.* and *Mores case*, 11. *Car. Tortill* 108. 109. 95. 27. And being but twelve yeares old, was bound by a Decree here 37. *Eliz. Wadhams case*; and upon a review decreed againe; *Cromwells case* *M.* 7. *Car. Tortill* 70. And was committed to the Fleet for disobeying a Decree 12. *Eliz. Tortill* 108. 130. Secondly, The Court may also, if it pleaseth, appoint an infant defendant a Guardian

By, and against
what persons:
And in what
Cases reliefe
may bee had in
Equity, or not.

S. c. 4.
1. In respect
of the persons
for, or against
whom it is to
bee had.
Infant.

dian to defend his Suit *2 Chancery Rep. 38.* Thirdly, A Copyhold was surrendered to the use of an infant, to the infant to pay an Annuity to another at his full age, which hee refused; it was decreed hee should pay it and the Arrears thereof; *Sawyer's case 9. Eliz. Tothill 107.* Fourthly, Young purchased lands in the name of *Mason*, in trust for himself and his heirs, and dyes; not declaring any determination of this Trust, *Procurator Mason* to convey it to him, being of Kin; hee conveys it to Infants. *C.* sues here as next Heir; and the Court agrees, that if the benefit of the trust did belong to *C.* that it shall bee decreed to him during the minority; and then that the Infants shall convey it, *Chancery Rep. 30.* Fifthly, A mother conveyed her lease to her son in trust, and after the sonne conveyed it to his children Infants, and it was decreed against the father and children, because done without any consideration, *Tothill 98.* Sixthly, The Lord *Mortley* between the dies and leasing of the conveyance of land sold, passed it to an Infant, and it was decreed against the Infant and him both, *38 Eliz. Lady Russell's case, Cary 30. 81.* Seventhly, The father being Tenant in tayle, sells his intayled land and leaves as much free-land to descend to an infant; the Court ordered, when hee comes of age to pay the mony given for the land, according to his fathers Will; or else that the purchaser shall have the free-land, *Tothill 184.* Eighthly, It seemes hee may bee here compelled to give a discharge of mony due to, and received by him, *Rayner's case 13 Car. Tothill 109.* Ninthly, One made an Infant Executor to prevent the payment of his Debts, and hee was ordered by the Court to pay them notwithstanding, *M. 9. Jac. Tothill 108.* Tenthly, an Infant in some speciall cases, may here bee concluded by his agreement. But regularly, if an Infant bee twenty yeares of age, and make a contract never so much to his advantage; the Court will not conclude him, nor will the Court decree against him by his consent, or the consent of his Parents, but in some speciall cases upon the merit of the cause, *M. 8. Car. in Chancery, Tothill 109. 95.* As a father was about to convey some of his land to his younger sonne; and his eldest sonne promised.

Tayled Land.

Agreement.

sed to give the younger son an hundred pounds to forbear it ; in this case the eldest sonne being an Infant, was ordered to stand to it : see *Stiles* case 2 *Car. Tothill* 95. Eleventhly, A surrender was made of a Copyhold by an Infant, to the use of J.S. for monie payd, and no help could bee had here, *Hughes* Case, *Tothill* 180. Twelfthly, If I take Bonds for my monie, in my Childrens name that are Infants ; I may release the Debts, and this Court will allow it, and forbid any Suit upon them, *Simonds* Case, *Tothill* 26.

For an Infant. Secondly, As to Suits by, or for an Infant. First, Hee shall have the same relief upon a breach of trust, fraud, or the like, in this Court, as another man may have, notwithstanding his minority, *Tothill* 108. Secondly, Hee may sue by himself, or by his *Prochein, Amy*, or *Guardian*, as the Court will give leave and order, *Woods* Case, *Hill* 2 *Car. Tothill* 9.

Husband and wife, woman over. Sect. 5. Against her Answer. Reliefe may bee, and is often given here against, or for a woman that hath a Husband ; as touching which, these things are to bee known. First, As to Suits against her. First, Shee shall bee compelled to answer with, or without her Husband, *Baisens* Case, 14 *Car. Mores* Case, 11 *Car.* and *Mich.* 5 *Car. Palmers* Case, *Caryes* Rep. 100. 101. *Tothill* 95. 96.

Decree, Commitment. especially if hee bee out of the Land, *Tothill* 97. 140. And shee will bee bound by the Decree of this Court, *West-deanes* Case, *Tothill* 93. and may bee committed till shee doe obey it, *Stywards* Case, *Tothill* 92. *West-deanes* Case *Tothill* 93. Secondly, The Husband sold Lands and Debts, which were due to the Wife before coverture, and took wares for it : he dyed, she survived, and hee released the Debts ; it was ordered against her, *Tothill* 91. Thirdly, The Husband and Wife were ordered to levie a Fine and perfect Assurances, *Tothill* 93. 6. The Husband was ordered to give security, that the wife should release her right to Land, *Tothill* 92. Fourthly, An agreement in some cases will here bee ordered to conclude her, *Stiles* Case, *Hill* 2 *Car. Tothill* 97. 95. where the merit of the Cause requireth it. As if a man have two Tenements of his Wives Land, and they agree with the Tenant, That if hee will surrender one, hee shall have three lives in the other ; and hee doth so, and the Husband dye, the Wife was ordered to make it good,

good, *Irelans Case* 37 *Eliz. Tothill* 91. But regularly it is otherwise : And therefore where shee hath Land with other co-Heirs ; and shee with the consent of her Husband, agree to take one thousand pounds to release her right ; the Judges did certifie, shee was not to bee concluded, *Trin. 7 Jac. Dockwrayes Case, Tothill* 98. Yet 10 *Jac. Randalls Case* was, That a single woman did agree, and after her marriage subscribed her name with her husband to a latter agreement, and was concluded by this latter, by the Courts Order, *Tothill* 96. But in *Slaters Case*, 37 *Eliz. Tothill* 92. shee and her husband did article to forgoe her Jointure for other recompence ; and a Decree was made thereupon (but without her consent) in her husbands life time ; and after his death the Court would not binde her to this agreement, *Tothill* 92. Fifthly, A Lease of Land was made to friends to her use, to begin after her husbands death, and they two levie a fine of the Lands ; this will Barr them in Equity, *Trin. 15 Car. Lifters Case, Tothill* 84. 9. A made over his Lease for years, to the use of C. his wife ; after hee and his wife sold the Land, and levied a Fine of it to D. the Court ordered that the Purchasor should enjoy the Land against the Wife, after her husbands death, 2 *Car.* One was seized of Land to the use of a *Feme sole*, who after took a husband, and the husband sold the Land ; the wife had the monie ; and shee and her husband desired the Feoffee in trust to convey it ; and hee doth so : yet it seems this Court will not Bar her of the Land after her husbands death : the Court ordered the husband and wife to levy a Fine of mortgaged Lands settled in her, *Lord Griffins Case, 4 Car.* To bring in evidences, *Kings Colledge Case, 4 Eliz.* forbid her to make waste, *Tothill* 92. 10. One did convey Land to the husband in trust, and hee took the profit, and left it with his wife, and she marry again ; they two were sued here ; and yet neither as Executor nor Administrator to a first husband, *Arklands Case, Tothill* 106.

As to Suits by and for her. First, In some Cases shee may sue her husband, as for Alimony and maintenance, where they bee parted ; but ordinarily shee may not sue her husband, nor her husband sue her, *Simpsons Case, Tothill* 94. 97. Secondly,

Ccc

shee

Devise by her
husband.

Devise by her.

Trust, how or-
dered between
Husband and
Wife.

Shee hath been allowed to sue without her husband; and with-
out his privy: especially hee being beyond the Sea, *Tobill*
95. 94. 97. The woman and her husband agreeing to part
upon difference, and hee giving her a summe of monie for her
livelyhood, which was put into a friends hand for her; shee
was allowed to sue alone for this without her husband, *Caryes*
Rep. 87. Thirdly, Shee was admitted to sue here for a duty
released by her husband gone beyond Sea, *Farewells Case*, 32.
Eliz. and *Bakers Case* 5 *Car. Tobill* 95. as for her Jewels 13.
Earl of Darbys Case, Tobill 96. And yet shee having goods
shee pretended to bee her *Paraphernalia*, the husband devised
them, and it was here allowed to bee good, and shee remedie-
less. *Davenports Case*, 5 *Car. Tobill* 79. Fourthly, If a wo-
man had goods at the marriage, and the husband doth use and
dispose them all his life time, and then giveth them away, or
make an Executor; this Court it seems will give her no re-
lief, albeit hee leave never so great an estate besides; unless
they bee goods set apart and preserved for her livelyhood, by
some agreement, or the like, *Tobill* 55. Fifthly, A wo-
man divorced from her husband *Causa frigida*, sued
here for her portion, her father being alive; and recovered
it, *Barratts Case, Tobill* 81. Sixthly, The wife being par-
ted from the husband, and having an estate to her self;
was allowed by the Court to devise it by her will, *2 M.* 15.
Car. Tobill 97. *Georges Case*. Seventhly, If a *feme sole*,
being possessed of a term, granteth it over, or a term bee gran-
ted by another to her own use, and then shee taketh a hus-
band, and dyeth; In this Case the Court ruled it to goe to
the Executor or Administrator of the wife, and not to the
surviving husband, *Pasch.* 32. *Eliz. Withmans Case in Chan-
cery*, *Coo.* upon *List.* 351. Where the Case was, *A.* being
possessed of a term, granted upon a marriage to bee had be-
tween him and *K. S.* to *J. S.* her brother, to her use; and af-
ter marriage *A.* dyeth; and shee marrieth again, and then
shee dyed; *J. S.* the brother took out Administration of her
goods, and got the Lease, and the second husband sued him
in this Court for the Lease, but the Court would not relieve
him, *Withnam vers. Waterhouse*. Eightly, *A.* being pos-
sessed

leased of a Lease for years, granted it to *B.* and *C.* to the use of *A.* and his wife; and after *A.* granted away all his Interest to a Stranger; and the Court would not order it against the wife, *Dyer* 369. *Crompt. Jur.* 65. Ninthly, *A.* conveyed her Lease for years to Lessees in trust, to the use of her daughters and children lineally. *A.* had a daughter by one husband, who had issue, and it dyed and the husband also; then shee marries again; then the Lessees in trust convey the Lease to the mother and her second husband, and discharges the trust; shee gives it to her husband, and the Heir sued for it; It was ordered, That the husband, and not the Heir, should have it, *Baskervilles Case, Tothill* 95. Tenthly, *A.* widow being about to marry, to prevent her husbands disposall of the Land, conveys it to friends in trust, who, with the husband, doe sell it for a valuable consideration, and shee sued here: decreed that the purchaser should re-convey it to her; but should first deduct all his disbursements, *Fitzjames Case, Tothill* 43.

A singlewoman, widow or maid, may sue and bee sued here as another body; wherein take these Cases. First, A widow of a Tenant in *capite* sued here for her Dower, and had a Commission to set it out, *Wilds Case, 25 Eliz. Tothill* 82. Secondly, But no woman shall recover Dower of a trust here, *M. 2 Car. Kemps Case, Tothill* 99. Thirdly, When shee cannot tell who is Tenant to the Land, shee may sue, albeit her writ of Dower lyeth at Law to discover the Tenant, to know against whom to bring her Action, *Tothill* 99. Fourthly, *A.* conveys Land to *B.* and his Heirs, to the use of him and his Heirs in trust, for *C.* and his Heirs (*B.* having then a wife) *B.* dyes, and his wife sued for Dower of the Land; *C.* sued against her for relief here, but it was denied; yet the wife of *C.* should not have had Dower in this Case; for a woman shall have no Dower of a trust, *Hearnes Case, Tothill* 99. So *A.* delivers *B.* five hundred pounds to put to use for him, and *B.* doth buy land with it, and makes *A.* believe it is for him, and in his name; but it was in his own name: *A.* seems satisfied herewith, *B.* dyeth, and his wife sueth to bee endowed of the Land; and the Court could give *A.* no relief against this

A feme sole.

Dower.

Suit, *Trin. 6 Car.* In the Court of Requests, if a woman Executrix subject to a *Devastavit*, marry a husband, if hee have not to satisfie, he shall be imprisoned by order here, *Caryes Rep. 24.* A Copyholder it seemes, may not be sued for the land without the Lord, *Caryes Rep. 57.*

Heire.

An Heir also here in some cases, shall sue and bee sued further than the Law bindeth him ; as in these cases. Firstly, An Heir of an estate in tayle having lands in Fee descended from the Ancestor, in lieu thereof is bound by Decree to repay the purchase-mony, or let the Purchasor have the free land, *Pearces case 8 Jac. Tothill 184.* The mother and son bought tayled land of *Hearle*, Ancestor to the Plaintiff, some of the mony due on a Bond which is lost ; the Court thought fit to charge the mother and the sonne, because of the land in their possession, *Hill 1 Jac. Caryes Rep. 25.* Secondly, A dumb man was ordered to answer here, *14 Car. Tothill 40.* And yet *22 Eliz.* a man both senselesse and dumb, was ordered not to answer, *Tot. 92.* It is then to be ordered according to his capacity. Thirdly, The Father sold his intayled land and suffered a Recovery, but had little for them ; it seems the Heir may compell the Purchasor here to give the worth, *Tothill 182.* Fourthly, The father articulated for land, the son no party, but consented to it, and it was agreed against him, *Pools case, Trin. 4 Jac. Tothill 69.* Fifthly, A Deed not enrolled was decreed against the Heir of the land, *Tothill 55.* Sixthly, The Father conceiving his land to bee free-hold, gave part of it to a younger sonne, and it fell out there was an old sleeping Deed of intayle ; and yet it was ordered the younger sonne should have it, *Pountnyes case, Tothill 54.*

Agreement.

Executors.

For them.

Against them.

Executors may charge or bee charged in Equity further than the Law doth charge ; wherein first as to Suits or Acts by them, take these things. First, Here they may sue one another, *Tothill 8.* Secondly, One of them may sue an Executor of an Executor, if hee have gotten the Estate into his hands, *Brertons case, 6 Jac. Tothill 87.* Thirdly, Two Executors bee, one doth disagree ; the Act of the other shall bind in Equity as it doth in Law, *Bacons case, Tothill 87.* Secondly, as to Suits against them, take these things. First,

One

One Executor alone without the rest, may bee sued here; but hee shall bee charged for no more than hee hath, *Harbuge case*, 35 *Eliz. Tothill* 86. Secondly, an Executor shall bee bound by a Decree against the Testator, *H. 5. Car.* Thirdly, Decree: Hee must pay costs adjudged here against the Testator, if hee Costs. have Assets. Fourthly, Hee shall not bee charged here for a Trespasse done by the Testator, *Hollands case, Tothill* 87. Fifthly, Nor may hee bee compelled here to give Bond to perform the will, without speciall cause bee shewed; as that hee is decayed in his Estate, or hath broken the trust already in some particular, or the like, *Browns case*, 37 *Eliz. Tothill* 86. Sixthly, Hee may here bee ordered to pay a Debt by word, before a Debt due by specialty, *Tothill* 53. Trespass.

One Joyntenant or Tenant in common, may here have reliefe against another: See *infra*. Tenants in Common.

The father may have reliefe against his owne sonne in case of breach of Trust, for a Lease, *Pasch. 1597. Domers case*. Joyntenant.

A Use or Trust was, and still is, either of land or of goods, and both these are either expresse or implied. A Use or Trust of Land, was a Trust reposed in another, that hee should suffer him that did Trust to take the profit of it, and hee that was trusted was to dispose the Land according to the direction of him that trusted him. As when a Feoffment was made to *I S* and his Heirs, to the use of *W S* and his Heirs; heretofore *I S* had the estate and propertie of the Land, but *W S* had, or was to have the profits in honestie and equity. So if one had agreed with *W S* for a peece of Land for twenty pounds paid, and had no assurance; yet the equitie of the Land was in the contractor. The use of goods is when one man hath them in trust for another. The use of Goods or Lands Expressed, is when the Trust or Use is expresse between the Parties, upon the making of the Estate implied, when it is not declared upon the Agreement, but left to the construction of Law: As if I bargain and sell my Land, levy a Fine, make a Feoffment, or suffer a recovery of my Land without money, and no use expresse, this in Law is to my owne Use: But if it be for money, it shall be to the use of the Bargaine, Conusee, Recoverer or Feoffee; And if it be without consideration that I

Upon a trust
or confidence.
Sec. 6.
Of Lands.

conveyed my Land by Feoffment to *I. S.* to have and to hold to him and his Heirs, to the use of his Heirs ; in this Case *I. S.* and his Heirs hath the Use in Law, *Coo. 1. 121. super Litt. 271. 272. D. & St. 95. Coo. 2. 58. 9. 11. Dyer 18. 146.*

The nature of
it.

A Use at the Common Law before the Statute was made, was, and where that Statute doth not take place, is nothing but a meer confidence and trust collateral to, and distinct from the Land annexed in privity of Estate, and to the person touching the Land to this purpose, that *cestuy que use* should take the profit of the Land, and the Feoffee or *terre-Tenant*, that was trusted, should make estates, and otherwise dispose of the Land, as the *cestuy que use*, in his life, or at his death, by his last Will and Testament should direct and appoint : and if hee made no disposition, then that it should goe to the Heir, so that the Feoffee had the Free-hold, or sole property of the thing in him, and *cestuy que use* had neither *jus in re*, nor *jus ad rem* (for if hee, against the will of the Feoffee, had entred into the Land, he had been a Trespasser) but a bare confidence or trust, for which the *cestuy que use* had no remedy but in Chancery upon breach of the trust, and there to have the Feoffee imprisoned untill hee performe the trust, according to the order of the Court ; and these uses to some purposes were reputed in Law, as Chattells ; and therefore were devisable by will, and to some purpose, as hereditaments, and a kinde of inheritance, of which there was a *possessio fratris*, &c. and to some purposes, neither Chattells nor hereditaments, for they were not esteemed Assets in the Heir or Executor.

Incidents of it.

And to every of these Uses there were two inseparable incidents, confidence in the person, and privity in the estate expressed by the parties, or implied by the Law ; and when either of these fayled, the use was either gone for ever, or suspended for a time at least ; and therefore if the Feoffee to use upon good consideration had enfeoffed another of the Land that had notice of the use, the use had been gone for ever ; because howsoever here was a privity of estate ; yet here was no confidence in the person : but if the Feoffment had been without consideration to such a one ; in this case the use had remained still, because the Law did imply a notice : So also it seems

seemes the Law was, when it was made in consideration of marriage only. And if a Disseizor, Abator, or Intrudor had come to the possession of the land, whereof the use was, albeit hee had notice of the use ; yet the use was suspended during their possession, and they should not have been seized to use as the feoffee was ; for they come not to the land in the *per*, but in the *post*. And if a Lord by Escheat, Lord of a Villain, or one that had entred for Mortmain, or that had recovered in a *Cessavit*, &c. had come to such land, and had notice of the use, the use had been gone for ever ; for these came to the land in the *post*, and above the use ; And the Tenant in Dower, and by the Courtesie, should not bee seized to uses in being ; for all these wanted privitie of estate : And if there had been Tenant for life, the remainder in Fee to the use of another, and the Tenant for life had made a feoffment in Fee to one that had notice of the uses, this second feoffee should not have stood seized to the first uses : So if the husband had made a feoffment in Fee of the land of his wife upon consideration, and without any use expressed ; the wife should not have had a *Subpana*, because the Feoffee was not in privacie of estate of the wife : And if *acting qua use* for life or in tayle, the remainder in tayle with divers remainders over in use, had made a feoffment to one that had notice ; hee should not have been seized to the first uses, *causa quo supra*.

But to open this a little further, wee are to know, That by the Statute of 17 H. 8. 10. the use or trust, and the possession of lands for the most part, are now at this day united ; And in all such cases where they are united, and the use executed by that Statute, the *Chancery* doth not meddle, but send men to Law. And such is this, where one seized of land in Fee, doth convey it to the use of one and his Heirs, or Heirs of his body, or for life, or to the use of one of his Executors and Administrators for years. But there are some uses and trusts still, that are not executed by the Statute ; and these remain as they were before, and are in the consuee and order of the Chancery ; as where Lands are conveyed without consideration in Fee-simple, after this manner ; That the Feoffee

fee and his Heirs shall take the profits and deliver them to the Feoffor and his Heirs; or that the Feoffee shall account and give the profits to the Feoffor; or that the Feoffee shall convey the Land to the Feoffor or to his Heir, at his age of twenty one years: or where it is conveyed to *J. S.* and Heirs, on confidence that *J. S.* shall Alien it to whom the Feoffor, or to whom *W. S.* shall appoint, or the like; or where the Lands be conveyed to certain uses expressed, and there to other secrett uses agreed upon between the parties. So where Land is conveyed without consideration to one and his Heirs, without expressing any use or intent; this is to the use of the Feoffor, who may dispose it as hee pleaseeth: But if it bee to any intent certain; as to take back an Estate with remainders to others, &c. here hee cannot change it. Where Leases for years in being before, are granted over in use or in trust: As a Lessee for years of Land grants it over to *A.* and *B.* and their Assignes, to the use of the Grantor and his wife for the term of their two lives; or if one bee seized of Land in Fee, and hee bargain or sell it, or make a Lease of it to another in trust, and for the benefit of a third person; These and such like uses and trusts are not within, nor executed by the Statute, but they remain as they were before the Statute; for all the State is in the party trusted, and the Grantor, or hee to whose use the Grant is, hath nothing but a use, for which hee hath his remedy only in Chancery, where all these matters are determinable: for it is a rule, That as the questions of uses and trusts that are within the Statute, are to bee decided and ruled by the Judges of the Common Law; so all other questions of uses and trusts that are out of the Statute, are to bee ruled and decided by the Judges of the Chancery, *Co. 1. 138. Dyer 369. 356. Cromp. Jur. 65. 58. 59.* And the Judges in Chancery, in ruling these uses, doe proceed much after the rules they went by in the regulating of uses at the Common Law before the Statute. It is needfull then, wee give you a taste of these. For this then, wee are to know, that before the Statute these were the Laws of uses. First, The Feoffor was to take the profits of the Land; and hee might have disposed it in his life time, or at his death to whomsoever hee pleased; and his friends in trust were to settle

settle it accordingly, or be enforced to it by *Subpoena* in this
 Court: And if hee did not dispose it, the use was to goe to
 his Heirs; and if hee had dyed without Heir or disposition,
 it seems the Feoffees should have had the land. Secondly, If
 the first Feoffee had conveyed it to a second Feoffee to the
 same use, or to a second Feoffee that had notice of the uses;
 in these cases the second Feoffee had it to the same uses. But if
 the Feoffee had sold it *bona fide*, or conveyed the land to one
 that had no notice of the uses; in these cases the use had been
 gone, & he to whose use it was, remediless for the land. Third-
 ly, A Bruit of a trust, or ones saying there was a trust to ano-
 ther, I being about to buy the Land, because he would not have
 me buy it, it seems is not sufficient; but a Suit about it and
 proof of it in Chancery, is sufficient notice to him that shall
 buy it. Fourthly, If the *cestuy que use* had appointed the Land
 to be sold by his Feoffees, to pay his Debts, the Creditors might
 have compelled the Feoffee to sell it. If he in his life time, or
 by will at his death, had appointed them convey it to *J S*; *J S*
 might have compelled them to it, and so their Heirs. Fifthly,
 The Feoffees (if any occasion had been) were to bring or de-
 fend any Action for the Land, and to plead such Pleas as the
 Feoffors should appoint, or be enforced in Chancery to it.
 Sixthly, If the Feoffee dye, and the land descend to his Heir,
 the party to whose use, as it seems, had no remedie against him.
 Seventhly, If the Feoffee or Donce to use, sell to one that
 knows of the use, the *Subpoena* shall goe against them both, o-
 therwise against the party trusted only, who must make a re-
 compence for the breach of trust, if the Land be gone. And so
 where the party trusted had released to a Trespassor, that knew
 of the trust, or a Statute or Bond was made to *A*. to the use of
B. and *A*. release to the Obligor privie to the trust; the *Sub-
 poena* shall be against them both, albeit some hold the contrary.
 Eightly, The Feoffor could not have disposed it, or medled
 with the profits in Law, without the Feoffees leave. Ninthly,
 If *cestuy que use* had been attainted of felony, the Lord
 could not have remedie by *Subpoena* for his Escheate. Tenthly,
 If the *cestuy que use* had made no dispoiall, or had been
 barred by the corruption of blood, it seems the Feoffee might

might have retained for ever to his own use. Eleventhly, the Feoffees of the Feoffor desired it were to doe any Act with the Land for the good of the Feoffor, and if he require him to make any estate to another, he must have done it : And if the Feoffor had appointed them to convey to *A* for life, the remainder to *B* ; if *A* had refused, he must have conveyed to *B* the remainder, or *B* might have compelled him therunto in Chancery : But such Requests were to be made in writing, and could not be made by a message, or upon desire by word only. Twelfthly, If one had had foure Feoffees of his Land in trust, and had sold it to *I S*, and told two of them that his Will was, that all foure of them should convey it to *I S*, and they two notified his will to the other two ; the first two did enfeoff *I S*, the other two refused, as they might, without somewhat under his hand to prove his Will : the Feoffor after sold the Land to another, and required the other two Feoffees to enfeoff it ; it was said this second sale was the best. The Feoffees in trust might have given allowance to necessarie Officers, as Stewards, Bayliffs & Receivers, and had allowance thereof upon their Account, but could not grant Annuities to their Councell, &c. Thirteenthly, the equity and use of the Land being to goe according to Conscience, the *Sabpuna* for Reliefe herein, in this court is given accordingly. These were the general rules by which uses at common-Law were guided, & much after this are uses not executed by the Statute, and trusts of Lands and Goods ordered & guided at this day, as may partly appear in the cases following. First, of Inheritance and Freehold. Secondly, of Chattels. Thirdly, of Goods.

Of Inheritance and Free-holds.

Cases of uses & trusts out of the Statute of Uses and otherwise under the Survey and order of this Court only.

If I without consideration Enfeoff one & his Heirs of Land, to the intent that he shall take the profits thereof and deliver to me and my Heirs : Or to the intent he shall account to me and my Heirs for the profit thereof : Or to the intent he shall re-convey it to me and my Heirs ; or to my Heir at twenty one yeares old : Or to the intent that he shall alienate it to *I S* and his Heirs, or to whom I shall appoint : Or I convey it to certain uses expressed, but there are other severer uses agreed upon between us ; in all these and such like cases which are

our

out of the Statute of uses, this Court, if any complaint bee, will order the parties trusted to perform the trust.

But for the opening hereof further, take these cases.

Of Estates of
Free-hold:
Sect. 7.

First, If I without any consideration bargain and sell my land by Indenture to one and his Heirs, to the use of another and his Heirs (which is a use upon a use) it seems this Court will order this. But if it were in consideration of money by him paid; here it seems the expresse use is void, both in Law and Equity. And if a woman in consideration of four hundred pounds paid her by her sonne, bargain and sell her Land by Indenture to him and his Heirs, to the use of her self for life, and after of the Heirs of her sonne; in which case by Law, the Fee-simple is to the sonne presently, and the use for life to the mother void; nor is there (as it seems) any reliefe for her in this Court in a way of Equity, because of the consideration paid: But if there were no consideration given, *contra*, *Dyer* 169. 155. *Crompt. Jur.* 55. 155. *Taillit* 188. 99. And yet if I enfeof *A.* in Fee of my Land, without any consideration to the use of *A.* and his Heirs, upon trust that hee shall alien it to whom I shall appoint, and I doe make no appointment in this case *A.* shall hold it to him and his Heirs for ever, discharged of trust, *Crompt. Jur.* 58. 59. And if I enfeof *B.* and his Heirs to the use of *B.* and his Heirs, in trust for *C.* and his Heirs; it seems *C.* may be relieved here. Secondly, if I deliver one money to buy land for mee, and hee buy it for himselfe, I shall here recover the Land bought, or the money I delivered to him, *Crompt. Jur.* 48. So if I deliver one money to put out for mee, and hee buy Land with it in his owne name, and tells mee it is for mee and in my name, and I agree to it; the Court will order mee the Land. If I give one money to purchase land therewith to him and his Heirs, and to suffer one to take the profits thereof during my life, and hee keepeth the profits from me; I shall be relieved here. Thirdly, If I purchase Land with my money, and buy it in mine owne and a friends name, to prevent my wife of Dower out of it, and my friend being requested, refuseth to release his right in the Land to mee; I may compell him to it in this Court, *Crompt. Jur.* 55. 54. *Castlings* case *Fitz.* Account 23. *Townes* case. The Defendant: con-

Sale to pay a
mans Debts.

Jointenancy.

Imperfect Deed

Acceptance.

feised the trust was ordered upon notice to convey it accordingly at the Plaintiffs charge, *Caryes Rep.* 67. Fourthly, A voluntary conveyance was made to friends in trust, to the use of the mans own children, with a remainder over; the Feoffor being indebted much monie, the Court enabled him to sell part of it to pay his Debts, *Grants Case, Tothill* 42. Fifthly, If land bee conveyed to A and his Heirs, in trust for B and C and their Heirs, and B by his Will devise his part of it; in this case the Court would not decree this devise; but held that the trust was to goe joyntly as the Interest in Law doth, 6 *Car.* in Chancery. So a man grants an estate in trust to friends, to the use of three daughters and their Heirs: the Court ordered all to the Survivor, *Barrows case, 10 Car. Tothill* 84. Sixtly, A enfeofed B in trust; and after hee by Deed, in which A is a party, makes a bargain and sale to J S, to the use of A, for life, the remainder to W S in tayl, the remainder to J S in tayl, but is not enrolled; A dies, W S dyeth without issue, B giveth out speeches to J S, that hee hath no estate in the land, and that if hee will have any made good, it must bee by him; whereupon J S, being afraid, accepted of an estate for his own life only, from him; And after sued in Chancery to have the estate in tayl executed according to the trust, and it was denied; and said hee had concluded himself, and that otherwise B should have been ordered to execute the State, *M. 8. Car. Southwells case in Chancery.* Seventhly, If one enfeof me of land, to the end that I shall enfeof J S thereof, and I convey it away to another without his privity; if hee doe afterwards agree to this, it seems hee is remediless, *Tothill* 180. 187. Eighthly, If one that hath land in trust convey it to one that hath notice of it, and hee convey it to one that had no notice of it; In this case it seems hee that had no notice is seized to the first uses, *Tothill* 186. *Pitts case.* Ninthly, If one convey his land to friends in trust, and after sell the Inheritance, the trust in Equity goes to the Purchasor, *Decreed Tothill* 44. 10. A, intending to purchase a long lease of B, and the Reversion of C, hee, to avoid latter incumbrances, purchased the lease in a friends name, and the Reversion in his own name, and after made a Feoffment of the land with Livery of Seisin to the

the use of himself, for life, and after of his first sonne, and then hee granted his term (which was in his friend) to a second sonne; in this case the Court would not settle the use of the Lease upon the second sonne, but seemed it should goe with the Inheritance, otherwise Purchasers shall never be secured. Eleventhly, If a man had been enfeoffed to the use of a woman *sole*, who taketh a husband, and they both for monie had sold this land to *B*, and the monie had been paid to the wife; and shee and her husband had prayed the Feoffee to make the Estate to *B*, after her husband dyed; the wife in this case had relief here; for it was Decreed, that all shee did was for fear of her husband, 7 *Ed. 4. 14. Fike. Subpœna 6.* So then now, if a Feoffment bee made to one and his Heirs, to the use of him and his Heirs, in trust, for a woman *sole*; Equity it seems will rule it after the same rule. Twelfthly, If one sell his Land to *B* for twenty pound at this day, and this is with confidence, that it shall bee to the use of *A*; in this case *A* shall have no remedy here, because there is an expresse consideration, *Dyer 109.* And yet if the Land bee worth more then the monie given by a great deale; it seems to mee reasonable, that for the overplus the Chancery should order it according to the intent. But regularly it seemeth such a consideration in an Indenture is not examinable, unless there bee some fraud in it. Thirteenthly, If Land bee mortgaged to *A* and *B*, and *A* only pay the money; and the intention is, that *B* shall take nothing; in this case *B* shall bee compelled to Release to *A*, 27 *Eliz. in Cargys Rep.* Fourteenthly, If one purchase Land for mee with my own money, in his name, in trust, that I may enjoy it during my life, and after that it shall goe to a charitable use, and I after repeale it and give it by Will to another, the charitable use, it seemes, is gone in Equitie, *Littletons case, Cargys Rep. 29.* If I make a Feoffment to the use of my Will, I may dispose this at my pleasure afterwards. But if it bee to uses according to Articles annexed, it is otherwise, *Cargys Rep. 29.* A Copyhold was surrendered to the use of *JS*, to the intent that he should pay an annuity to a third person, the which he refused, the Court ordered him to pay it, with all the arrears. *T. 107.* If I purchase

Lands in the name of another and his Heirs, and dye without declaring the use, and one of my kin procure him to convey the Land to him and his Heirs, and hee convey it to others, and my next Heir sue, and the benefit of the trust is made appear to belong to him; the Court will order it to him, *Caryes Rep.*

Of Chartells
reall, and
terms of years.

If I bee seized of Land in fee, and convey it to J. S. and his Heirs, to the use of ~~W~~ S his Executors and Administrators for twenty years, or for any other number of years; in this case the use will be executed within the Statute. But in case where I bee possessed of a terme of years in being, and grant it to friends, to any uses and purposes in trust; this is out of the Statute of Uses, or orderable in Chancery only; where, if the trust bee broken, I must have remedie. But for the further opening hereof, take these cases. First, One possessed of a term in years, conveys it to friends in trust, to the use of A for life, and after of the Heirs males of his body: In this Case the Court Resolved and Ordered, That A, so long as hee hath an Heir, may dispose it; and that an intayl of a trust of, or out of a Chartell, is not good: But a remainder in tayl of a trust may bee ordered in Equity, the Judges agreeing to it, *Tattons Case*, 7 Jac. Terbill 83.

Entayle.

Executors.

The generall Trust of an Executor is to pay Debts and Legacies, and for the surplusage, to account to the ordinary *ad pias usus*. But if hee have any speciall Gift in the Will, then hee may have it to a speciall use. But for the trust of Executors see in other sections, *Caryes Rep.* 21. *Henry Earl of Darby* conveyed certain leased lands in trust to *Doughby* his servant, for payment of his Debts; and upon mediation of an end of controversies between the daughter of *Ferdinand*, eldest son of *Henry Earl*, and *William* his yonger son, now Earl; It was ordered and agreed, That *William* the now Earl should pay all his fathers Debts; whereupon *Doughby* conveyed these leases to *William*, and after the Creditors sued him in Chancery, but had no relief, and were ordered to pursue their remedy against *Earl William*, *Hill* 1 Jac. *Caryes Rep.* 25. The Suit was to bee relieved on a lease made to the Defendant in trust, to the use of the Plaintiff; the which appearing, it was ordered, That the Plaintiff should enjoy the land against the Defendant, and all clayming

clayming under him that had notice of the trust ; and if the lease were sold to such as had no notice of the trust ; then that the Defendant shall pay to the Plaintiff so much monie as the lease was worth, *Roke vers. Staples*, 21 *Eliz. Carys Rep.* 76. The Plaintiffs wife conveyed away her Estate to the Defendant her sonn, before marriage, and after the Defendant conveyed it to his children : In this case the Court conceiving it to bee done without any consideration, did decree it for the Plaintiff, against the Defendant and his children, *Poyes case*, *Turbill* 98. A widow being about to marry, to prevent her husbands disposall of her leases, made them over to friends in trust, after marriage hee and they, for good consideration, sold them ; his wife, after his death, sued here, and had relief for them against the Purchasor, but disbursements were allowed, *Fitzjames case*, *Turbill* 43. A *feme sole* was possessed of a term to her use only, and then took her husband and then dyed ; the Court ordered it to the Executor or Administrator of the wife against the husband, *Pasch.* 32 *Eliz. Withiams case*. So *A* being possessed of a lease for yeares granted it to *B* and *C*, to the use of *A* and his wife, and during the marriage *A* granted away all the interest to a stranger ; the Court would not order it against the wife, *Dyer* 369. *Crompt. Jur.* 65. *A* being possessed of a term, granted it upon a marriage to bee had between him and *K S*, to *J S* her brother, to her use, and after marriage *A* dyeth, and shee marrieth again, and then shee dyed, *J S* took out an Administration and got the lease ; the second husband sued for it here, but could not bee relieved, *Co.* upon *Lit.* 351. see before sect. 5.

If I deliver mony or goods, or cause a Statute, Bond, or other Especialty, to bee made to another, to my use, or to any purposes or intents in trust, and hee perform not the trust ; I may compell him to it, or to give me recompence for the breach of the trust here ; and therefore if he dispose the mony or goods to his own or any other use than I appointed, or will not dispose it according to my mind, or release or discharge the duty ; my remedie is by *Subpoena* in this Court ; and if in these cases the goods or mony bee taken from him, or hee have any injury in them, hee must sue for remedie, and I may compell.

Of Chattels
Personall or
Goods.

compell him to it here. 7 *Ed. 4. 14. 19. 11. Ed. 4. 8. Cramp. Jur.* 43. 62. 65. *Broo. Feoffment* 60. for the opening whereof, take these cases. First, If I deliver monie or goods upon any consideration to B and C, for a marriage-portion for K, and to deliver to her at her day of marriage, and I doe after countermand the delivery; or B and C will not deliver them to her; it seems they may enforce them to it here. but if the delivery bee voluntary and without any inducement and consideration, *contra. Dyer 44. Crom. Jur. 54. Dyer 49.* Secondly, Two hundred marks were delivered to A to keep, and to deliver to B to keep, and to be delivered to A when hee shall require it, and after the death of the owner, to deliver it to his Executors or Administrators; A delivers it to B and takes Bond for it, and then hee makes an Executor, and dyeth: in this case the Executor may in this Court compell A to sue B for this monie if hee refuse to doe it. Thirdly, If an Obligation be made to another to my use, and it be forfeit, and hee will not sue; nor my Executor may compell him to it in this Court; *Broo. Conscience* 10. 2. *Ed. 4. 2.* Fourthly, If a Statute bee made to A and B, to the use of A alone, and the Conusor get a release of it from B alone; in this case A shall have remedy here against them both; as some say against B only, and not against the Conusor, as others say, 11 *Ed. 4. 8. 3. Ed. 4. 7. Garges Rep. 14. 15.*

Upon a bargain agreement or promise; And how it shall be taken and performed.

Sect. 38.
about Land.

One may here have relief against a man upon his promise and agreement, further then by the Law hee can have: For opening whereof, know these things. First, If I for monie purchase and contract for Land, with or without writing, and have paid all, or any considerable part of the monie, or have given security for it, or am any way engaged to pay the monie, or it bee, by way of Exchange for other Land the which hee hath entred upon, but I have no assurance of the Land; I may here compell the seller, or if hee bee dead, his Heir, or Executor, or Devisee, if hee did devise it, that hath the Land, to assure the Land according to agreement. And if the seller sell away the Land to another, that had notice of the first contract with mee, I may have my *Subpoena* against them both, 24 *H. 7. 47. Cramp. Jur. 44. 45. Tohill 24.* Secondly, Articles of Agreement were briefly drawn between two, and their hands to it,

Articles

for

for the sale and assurance of land for monie; the seller refused and upon complaint here, was ordered to make the assurance according to the agreement; the manner of the assurance referred to a Master of the Chancery, *Chivers case, Hill 4 Car.* Thirdly, A Suit was here upon a Paroll-Agreement, to execute an assurance of Land upon a marriage-Agreement, the case being thus: *A*, suitor to *B*, the brother of *A* comes to *B*, and tells her that if shee will marry his brother, hee will assure her of twenty pounds a year land for her Jointure, and shee did marry him, and after hee refused: It was Decreed in this Court and the Court of requests both, That hee shall bee compelled to it. Fourthly, It was said by *Glanville*, That heretofore the Chancery did not use to Decree Paroll-Agreements for assurance of land, but it is now otherwise, for where there is any execution of it by payment of all, or any considerable part of the monie for the land, there it doth Decree it: And where the agreement is for selling land by writing, albeit it bee not sealed, or any earnest given or monie paid, yet this Court doth use to order the partie to assure the land accordingly. Otherwise it is where the agreement is for any other thing but land: And in 19 *Jac. in Briggs case B R*, a prohibition in this case was denied to the Councell of the Marches of *Wales*, upon a Suit there to have Land assured upon an Agreement because however it be he hath remedie at Law by action of the Case; yet this is for damages only, and cannot force him to assure the Land: And in all cases Regularly, where Articles are under hand and seale for the assuring of Land for money, the Court here doth use to Order it to be done according to the Agreement. Fifthly, But it seemes the Law is not in all points as Master *Glanville* before said, for in *Hill. 9 Car.* In the Exchequer, one sued by English Bill upon a paroll-Agreement, to have Land assured, and shewed that he had provided two thousand pounds, the purchase money, to his great losse, &c. and the other refused it, and to assure the Land; in this case the Court would not Decree the assurance of the Land, but Decreed he should pay the Plaintiff damages for his losse. So in 13 *Car. Olivers case*, The Agreement was to convey the Land as Councell should advise, the Paper-book

drawn, agreed, and to be ingrossed, and then the seller refused to proceed ; in this case the Court would not Decree it to bee done, because no Articles nor money paid, but a bare paroll agreement, and yet some speciall circumstance may make this binding ; and therefore a verball Agreement between Lord and Tenant, because the Tenant was an Ancient Tenant, and hath been at charge in building, was Decreed, *Kings case* and *Hunts case*, *Torbill* 65. 66. Sixtly, A Covenants with B, upon the marriage of his daughter, to levie a Fine of the land to D, and the daughter being dead, and some money unpaid, A sold away the land to others ; in this case hee was Ordered for a hundred marks to make the Estate good, *Torbill* 47. 48. *M.8 Car. Pages case*. Seventhly, A Suit was in this Court upon a paroll agreement to assure land, and the agreement was eighteen years before, and the Suit was against Purchasors that came in upon valuable consideration (to wit) the buying in of Mortgages, and paying of Debts and Fines and Proclamations, and five years time without claim were past ; in this case, albeit it did appear that the Purchasor had notice of the agreement, yet it was dismissed by the Court to the Law : And in these and such like cases, where an Action lyeth at Law, the Purchasor, or Party to whom the promise is made may use that and waive his remedy in Chancery, 21 *H. 7.* 43. Eightly, If I and another man make an Agreement about any thing, by word only, and it hath *quid pro quo* in it, and I have no witness to prove it, I may sue him here, and put him to answer it upon his oath : But upon a *modus pactum* there is no more remedy to bee had in Chancery, then is at the Common-Law, 3 *Ed. 4.* 4. *D. & St.* 12. 154. Ninthly, If it bee agreed by Indenture of Feoffment of land between mee and another, That the Feoffee shall pay ten pounds to a stranger by a day, or ten pence a year ; otherwise that the stranger and his Heir shall enter on the land ; or that the land shall bee conveyed to a stranger, or the like ; in these cases the stranger for not payment, cannot enter by Law. But some say the Feoffee may be compelled in this Court to execute the estate according to the agreement, *D. & St.* 94. But if by agreement there bee a condition to give a Re-entry to a stranger, this is not good in Law.

Notice.

Nudum pactum

Law, nor will this Court execute it, for it is against a principle of Law, *Crompt. Jur.* 50. *D. & St.* 100. 101. *Crompt. Jur.* 49. Nor is the Feoffor when hee doth enter, bound in conscience to give the land to the stranger. Tenthly, If I by Deed poll, and not by Indenture, make a Feoffment in Fee, Gift in tayl, or lease for life, the remainder over in Fee rendring a Rent; this reservation is not good in Law: but I shall have remedie upon the Equity of my case in this Court, *D. & St. lib. 2. ch. 19.* Eleventhly, A Bill was preferred here, supposing ten shillings paid, and two thousand pounds to bee paid for land, to have the lands assured, and upon a Demurrer it was over ruled, because it may bee to prepare for an Action of the case: but it seems in this case the Court would not decree the assurance, *Trin.* 38 *Eliz. Williams case, Tothill* 72. Twelfthly, If any agreement have been made by writing for the assuring of land, or any thing else, and the writings are lost; the party grieved must have his remedie in this Court. Thirteenthly, If I make a lease of Mills for years, excepting the profits thereof for my life; this exception is not held good in Law; yet it is thought I may have it allowed in Equity, because of the intent, *Crompt. Jur.* 64. Fourteenthly, If a woman sole take a consideration for a lease of twenty one years, and then marry, and shee and the husband make the lease promised; after the Lessee doth surrender, and take a new lease for another twenty one years; the husband dyes: in this case the wife is not to enjoy the rest of the first lease, because the surrender was voluntary, *Caryer Rep.* 21. Fifteenthly, One for seven thousand pounds, whereof not a penny was paid, and yet an acquittance given thereof by the Feoffor, enfeoffed one in Fee of his land, but took the profits thereof all his life; in this case the Feoffee shall not have this land in Equity; and if hee doe goe about to take it, the Feoffor shall bee relieved here against him, *Dyer* 169. *Crompt. Jur.* 153. Sixteenthly, The customes of a Mannor were in question between Lord and Tenants, and Tenant and Tenant, and a generall agreement made by Deed indented and enrolled here, and a Bill to establish it, and nothing could bee found but the Deed: And yet the Court would not alter it, albeit it was objected the Lord was at the time of agreement Tenant in tayl, and some

Injunction.

of the Tenants infants and *feme-covers*, *Caryes Rep.* 22. Seventeenthly, If one enter into a Statute to *f. s.* who doth afterwards by Indenture of agreement promise and agree with the Conufee, that in case the Conufor did fail of payment, execution should bee done upon some certain Land only: in this case, if after it hee shall sue execution upon any other lands, the party grieved may have relief here, and compell him to perform his agreement and have an Injunction also if hee desire it, *Pulvertosts case, Caryes Rep.* 37. Eightteenthly, The Plaintiff sued to bee relieved on a promise for a lease of lands and to stop a way; and exception was taken to the Bill, because the Defendant had remedie at Law and not allowed. So to remove a Nuisance, or the like; for at Common Law nothing can bee recovered but damages; but this Court may order the thing it sel: to bee done, *Caryes Rep.* 20. 53. Nineteenthly, The Plaintiffs Bill was, that hee leased a house to the Defendant, and did covenant to repair it, and then the Defendant did covenant to keep it so, and that the Defendant, as well to make the Plaintiff break his covenant, as to free himself from his covenant, did interrupt and threaten the workmen so that they durst not goe on, & so the houses are decayed, and the Plaintiff without remedie; the Defendant Demurred, pretending the Plaintiff had remedie by Law; but was over-ruled and put to Answer, *Caryes Rep.* 59. Twentiethly, A Bill was brought upon a promise by word, for leave to drie clothes in a Garden, and was dismissed for the smalness of the thing, 21 *Eliz. Hambyes case, Caryes Rep.* 76. One and twentiethly, The Bill prayed relief against the Defendant as brother and Heir, for that the Plaintiff had paid to his deceased brother thirty four pounds for a lease, and bee dyed before it was made, and therefore desired his lease or the monie, and was relieved, *Caryes Rep.* 77. Two and twentiethly, One Jointenant promised the other, lying on his death-bed, hee would not take advantage of the survivorship; but suffer him to dispose of it by his Will, by which hee devised part for the payment of his Debts, and the survivor was Ordered to make the Estate accordingly, *Caryes Rep.* 81. Twentythirdly, The Plaintiff bought of the Defendant the Reversion of a Coppyhold, which hee could not enjoy as was

Jointenant.

was confessed by the Defendants Answer 3. Ordered by the Court to shew cause why hee should not repay the money back againe which hee had received on the bargain, *Caryes Rep.* 93. Twentyfourthly, Upon the hearing of the Cause, it appeared that the Suit was, to bee relieved upon a Promise made by the Defendant to the Plaintiff, to surrender a Lease upon the payment of a hundred markes; and because the matter was meete for the common-Law, it was dismissed; *Caryes Rep.* 95. 97. Twentyfifthly, Baylifs of a Town promised a Lease, the Court upon this would not give Reliefe against any of their Successors, but against the same Persons, as common Persons, upon the Promise, *Caryes Rep.* 103.

What Agreement made by an Infant, or a woman-covert will bind here, See before, Sect. 4.

If any mistake be in a Deed, that it be not made according to the intent and agreement of the Party, it may be holpen here. For the opening whereof take these Cases. First, If part of the Land bought and sold, be left out of the Deed, or the word Heirs, being in Fee simple, or the like, be omitted; and the conveyance be made upon good consideration; this Court will rectifie it: See after for this, *Caryes Rep.* 16. 17. Deane and Chapter of *Bristowe* made a Lease, mistaking the name of the Corporation; and the Court held that for Leases made for reasonable time, and upon good consideration; there should Reliefe be given here, *Caryes Rep.* 32. The Lessee in the Lease, was not named in the Premises of the lease, but in the *Habendum* only; Decreed to be good; and being referred to the two chief Justices, and chief Baron, was by them certified to be good in Law, *Butlers case* 12. *Eliz.* *Caryes Rep.* 88. Secondly, A man by Bill here supposed that he had conveyed more Land by the Deed then was intended and agreed: in this case, because it appeared the Defendant was a Purchaser upon unvaluable consideration, the Court would not relieve the Plaintiff, *Cliffords case* 4. *Jac.* in Chancery. And yet see a case where more lands passed by a Fine than was intended, and the party relieved here by the Judges consent, *Caryes Rep.* 20. Thirdly, But if one possessed of a term grant it so one for life or intayl, & after to another for life or in taylor, in these cases where by Law it seems

Upon a Mistake in a conveyance of land or other Deed Sect. 9.

Grant of a Term.

Entayle of a
Term.

Devise.

Power to make
Leases.

Upon a defe-
ctive Assurance
of Land, to en-
force the per-
fecting of it,
Sect. 10.

the first will take all; no reliefe shall be neither in Law nor in Equity to him in remainder: But if it were a Devise, after this manner it would goe in Law and Equity according to the intent. *Crompt. Jur. 64. Plow. 520. 539. Dyer. 74. 253. 277. Coe. 8. 95. 10. 47. 60* If I have a term of years and grant so much thereof as shall be to come at my death; it seems this grant is void in Law and Equity. But if it had been by will thus devised, reliefe might have been in Equity at the least, *Crompt. Jur. 63*. Fourthly, Mistakes in the making of a Bond in either of the parties names may be holpen here, *Colstons case, Tothill 27*. Fifthly, If a Power be reserved to make leases by covenant without a transmutation of possession, no help can be here, because it is void in Law; and if it be upon a change of possession, and the Power bee not precisely followed; that is doubtfull, and rather more strong against help; for then the estate works and the power gone, and upon Wills no help, *Caryes Rep.* Sixthly, If one be bound to mee for monie, and the same day after the sealing of the Bond I give him a Release for other things and by mistake, whereby this Bond also is released: in this case I may bee relieved here and shall recover the monie notwithstanding, *Tops case, Tothill 27*. Seventhly, *Haddons* the husband was ordered to procure his wife to levy a Fine, and to enter into a new Bond of five hundred pounds, because the old Bond was worth nothing, by the mistake of the writer, *10 Jac. Tothill. 140. see more sect. 8. before.*

If a conveyance for land bee defective and the Estate not well executed to the Purchaser according to the intent of the parties, for lack of words sufficient in the Deed, or for lack of livery of Seizin, Attornment, Inrolment, or the like; and there were a good consideration given for the land: in these cases the Purchaser may compell the party in whose power it is to perfect the Estate, to doe it; and this he must doe in this Court, *D. & S. 85. Plow. 302. Tothill 44. 48. 182. 183. 138*. For the further opening whereof take these cases. First, If I for monie sell land to one, and the word Heirs is left out in the *Habendum*, I shall bee compelled to amend it; and so when less is granted than was intended; and so for any other mistakes, *Caryes Rep. 16. 17*. A Message was denied (*sum pertinentius on* ly)

ly) and because sundry lands had been occupied therewith for the same Rent, and by lease of the same words, the Lord Chancellor *Bromley*, and the Judges ordered it should all pass; though perhaps they will not pass in Law by these words: But it seems in such like cases it is very considerable in Equity what the value of the land is, & what money is given; for if the house with the appurtenances bee sufficient for the money, unless the intent of the parties were to grant the whole; it seems to me reasonable that no extent should be made further then the Law makes. Secondly, The Ancestor takes money for a lease and dyes before it is made, the Heir must make it good, or repay the money, *Caryes Rep.* 77. Thirdly, If I buy a *Rent de mortis* for money, and take a grant of it by word without deed (which is not good) I may compell him here to make mee a Deed of it, *D. & St.* 86. Fourthly, If one for money sell me land by Deed, but livery of Seisin is omitted; I may compell him afterwards to doe it by the help of this Court. And if one for money sell me land in two counties and have given me livery only of the land in one county; this Court will order him to make livery of the land in the other county, or pay back part of the money, *Crompt. Jur.* 49. *D. & St.* 37. *Caryes Rep.* 17. Fifthly, So regularly if a conveyance be imperfect for lack of Attornment of the Tenant; the Tenant shall be compelled to attorn by the power of this Court; and so it was in *H. 3. Car.* *A* was Lessee for twenty one years, and leased to *B* for ten years, rendering Rent; *A* without the privity of *B*, did grant the Reversion to *C*, and *B* refused to Attorn, and *C* thereupon sued *B* in Chancery, to compell him to Attorn; & in this case it was decreed by the Master of the Rolls, with the assent of the Masters of the Chancery, That he should Attorn and pay the Arrearages, Just. *Whitlock* then assistant, being utterly against it; and of his opinion were the two chief Justices, ch. Baron, and Just. *Dodridge*; but they all agreed, the parties themselves to the Assurance may be compelled to make livery; And it hath been often denied here to compell him to Attorn who is at liberty by Law, especially where the party quarrelleth at the Tenants Estate, or entreth into part of the land; or hath covenanted for recompence in case of not Attornment, *Caryes Rep.* 4. *Higbam*

contra Land, the party before livery of Seisin, and before assurance perfected, ordered to bee perfected, *Pas. 7 Car. Tothill* 129.

Sixthly, But in all these Cases, if the conveyance bee made without any good consideration, this Court will not give relief. And therefore if a Rent bee granted without Deed, and nothing is given for it, or a Reversion is granted and nothing is given for it, the Grantor cannot bee enforced to perfect it, *Crompt. Jur. 49. D. & St. 37.* Seventhly, An Estate was made by Covenant, not good by Law, and Ordered here to be made good, *Princes case, 40 Eliz. Tothill* 85. Eighthly, A Deed not Enrolled was decreed against the Heir of the Land, but agreed it should not bind any other Estate challenged by Survivorship or otherwise, *Pawles case, 14 Car. Tothill* 55. Ninthly, The Defendant would have avoyded an Estate for lack of livery of Seisin, and the party grieved complained here, and it appearing hee had quietly enjoyed it twenty five years, it was Decreed hee should quietly enjoy it without Livery of Seisin *Bydens case, 17 Jac. Tothill* 54. Tenthly, A demised a Mannor, excepting the court Baron and perquisites, &c. which exception in Law is void: if the Lessee in this case refuse to do suit to the Court, the Chancery will compell it, because of the intent, *Caryes Rep.*

Upon a promise
about Goods or
Debts.

Nudum pactum.

If I contract for goods and have any wrong in it, that the party doth not perform with mee, if I give *quid pro quo*, that there bee a good consideration in it, I may have remedie here; but if there bee no consideration in it, *contra*: wherein take these cases. First, If one promise mee ten pound for a Trespass hee hath done to mee, no remedie is given mee for this in Law, nor here in Equity, *D. & St. l. 2. ch. 24.* Secondly, So if one promise, without good consideration, to make mee a Watch, I cannot compell him to it here, *Crompt. Jur. 49.* Thirdly, The sonne made a generall and voluntary promise, without any consideration, no advancement coming to him by his Father, to pay his Fathers Debts, and upon a Suit here it was dismissed, *Alexanders cases, 7 Car.* Fourthly, The Obligee agreed with the Obligor, to give him day for the Debt, and hee sue him, or a surety before the day, in this case hee may bee relieved here,

and

and it seems by Injunction, 9 Ed. 4. 41.

Injunction.

If one that hath any Engagement of mee by Feoffment, Upon an extre-
Mortgage, Statute, Obligation or otherwise, take me upon any mity used on a
advantage, upon any strict condition or agreement, and use Mortgage, or
extremity towards me; I may be relieved in this Court, where Statute, Bond
he will be compelled to accept of Reason. For the opening or other En-
whereof take these cases following. First, if I make a Feoffment gagement.
to another, upon a condition to be done by me, and I doe not St. 11.
perform it, and thereby lose the Land; I am remediless in Chan- In a forfeiture
cery, *D. & St. l. 3. ch. 33.* But if I convey land to another, on- of Land.
ly as a mortgage and for a security for monie he doth lend Mortgage.
me; in this case, albeit the time of Redemption bee past, yet
upon the paying of the monie, interest and damage, I may have
my land again, at any time, by Decree of this Court, *D. & St.*
l. 3. ch. 33. And in 8 Car. in Chancery, between *Coxwell* and
Gardner, Sir *Robert Rich* said that it was the constant course of
this Court, That if *A* mortgage land to *B* for a hundred
pound, and the land is more worth, and it bee forfeit; that *A*
notwithstanding this, may assigne it to *C*, to satisfie this debt,
or mortgage it to another to satisfie this debt, or devise it to
his children; and in these cases *C*, the second Mortgagee or
Children shall by Order here, upon payment of the mo-
nie interest and charge to *B*, his Executor, &c. have it De-
creed against them, *Experientia, Higate's case, 14 Car.*
Toshill 78. Secondly, And yet when it hath continued long,
as twenty years or upwards, this Court would not easily give
back the land; and if the Mortgagor make a Feoffment of it
to a stranger; and so extinguish the condition, unless it bee
to the end to pay the debt, the Feoffee perhaps may not have
this advantage, *Caryes Rep. 53.* And in 39 Eliz. *Crowthers*
case, Toshill 79. The Plaintiff, being Heir to lands in tayl, Heir to Land
and likewise devised to him by his mothers father, and these entayld.
being mortgaged, and redeemed by a stranger, having sold it
again, with the consent of the Father and Mother, could not
bee relieved here. Thirdly, A Purchaser of land, *bona fide*,
subject to a Recognizance, and the Heirs of the Recognizor
or Obligor shall have relief against a penalty also. Fourthly,
A Copy-holder in Fee, surrendered to the use of one and his
Heirs,

Heirs, upon condition of redemption, after this hee writes down his Debts, and doth Will part of his land shall bee sold to pay his Debts; after his death one of the Creditors doth pay the monie at the day of the Mortgage, yet the surrender was enrolled, and another Creditor sued him and the Heir here, and had a Decree that the land should be sold to pay the debts, and if any remained it should goe to the Heir, 4 *Elix. Carges Rep.* 17. Fourthly, A sold land to B, that was his Heirs, and mortgaged other land, to the end the Heir should assure it when hee came of age, before when B dyed without any Heir known; in this case the Mortgager, to avoid danger had relief here, where it was ordered, the Heir should convey the land to two of the Six-clerks, there to remain till the Heir bee known, *Cuttings case, Carges Rep.* 29. So Lessee for years rendring Rent, and two men strive for the Reversion upon a Bill against them, and payment of his monie in Court according to his lease; hee had an Injunction to forbid them both to trouble him, *Carges Rep.* 46. 47. Fifthly, But regularly this Court doth give relief against them that take advantage upon any strict condition for undoing the Estate of another in lands, upon a small or trifling default. Sixthly, If the Conuisee of a Statute extend the land in the hands of one of the Purchasors and spare all the rest, hee may bee compelled to doe it on all, *Carges Rep.* 111. 112. Seventhly, If one grant a Rent charge out of all his land, and after sell it by parcells to divers persons, and the Grantee force one only to pay it; hee may here bee relieved and force the rest to contribute, and the Grantee to take no more of him then his proportion: But then hee must make all that are chargeable with the Rent Defendants, and put them to strew cause, if they can, why they should not contribute, *Carges Rep.* 2. 23. 92. Eighthly, When the Conuisee upon a Statute, or Plaintiff on a Judgement, hath received satisfaction: The Plaintiff or Conuisor, his Heirs, Executors, or Administrators, or a Purchasor charged or chargeable by it, may force him, his Executors or Administrators, if hee bee dead, to acknowledge satisfaction on the Judgement, or to deliver it up. And if Statutes bee very antient, this Court will force the owners of them to deliver them up without satisfaction.

Contribution.

Statutes,
Judgement.

isfaction. And so the Court will force the delivery up of old Bonds, *Tothill* 178. 179. *Caryes Rep.* 45. 46. Ninthly, If a man have received the monie due from me upon a Statute, and yet the Statute lyes against mee : in this case it hath been said, I shall not have remedie here, because it is a Record against which no Averment lyeth : But it seems the practise is otherwise, and there is as much Equity for this, as in case of another Engagement, *Crompt. Jur.* 43. 22 *Ed.* 4. 6. *D. & Sr.* 23. *lib.* 1. *ch.* 12. The Plaintiff had an Execution for three hundred pounds, and was ordered here to take it out only for one hundred pounds, *Caryes Rep.* 51.

If I have paid my money on an Obligation with a condition after the day, or a single Obligation at the day and according to Law, and have no acquittance for it ; or have, at or after the day, or otherwise, satisfied it ; and hee hath accepted it and is satisfied, and yet hee keepes the bond, &c. and refuseth to give mee a discharge: in these cases I or my Executors, &c. after my death may enforce him, this Executors, &c. after his death, in this court to discharge it, and deliver up the Engagement, 22 *Ed.* 4. 6. 7 *H.* 7. 11. *Caryes Rep.* 74. 111 *H.* 7. 14. *Tothill* 26. 27. Tenthly, If I have forfeited a bond, and am in danger to have a great penalty recovered of mee thereby, I shall have Reliefe here ; As in case where one doth his best to pay money at the day, and by being robbed, or some other mischance is let, and he renders it in a short time after ; So where part of the money is paid, and yet the whole Engagement lyeth, and the party that hath it doth refuse to deliver it up, or to receive the rest of his money, being tendered shortly after the day, or acknowledge what is paid, &c. *Caryes Rep.* 1. 22 *Ed.* 4. 6. *D. & Sr.* 23. *Crompt. Jur.* 43. So where the bond is to doe any thing else, and the thing is done, and condition performed, *Caryes Rep.* 45. 46. So where one hath a double securitie of me for a single debt, as a bond and goods in pawn, or the like, I shall here force him that hath it, to deliver up one of them, *Crompt. Jur.* 43. 16 *Ed.* 4. 9. *Tothill* 26. 27. Eleventhly, If I bee bound as a surety with another for a debt, the which hee hath paid, or hee hath paid part of it, and hath a further day given him for the rest ; or by agreement hath a further

Obligations.
Bills.

day, or he is released of the debt, or the Creditor hath agreed with him to take some other satisfaction ; in all these and such like cases, I may have advantage of this and bee relieved in Chancery, 6 *Ed. 4.* 41. *Crompt. Jur.* 44. Twelfthly, If my Scrivener that doth use to put out & receive my mony, receive my mony at the day, I having the bond, and will not deliver it up ; I may compell him in this Court, *Hunts case*, *Hill.* 22 *Jac.* *Torbill* 175. Thirteenthly, If one enter into a bond, or any other Engagement for money unlawfully gotten, as at Dice or Cards, or to procure a Marriage, or on a Symmonaicall Contract, or upon a Cheating Contract, or the like ; here is the place to bee relieved against it and have it took up or canceled, *Torbill* 24. 23. So if I have given an Engagement for that which is nothing worth, neither gain to me, or losse to him ; as for Debts, things in Action not recoverable, or the like, *Comp. Jur.* 45. 44. *Caryes Rep.* 17. 37 *H. 6.* 12. *Torbill* 23. 26. 27. *A* had a sonne he intended to present to the Church of Dale, and hee being sickly, presented *C* for the present, taking Bond of him of six hundred pounds to resigne upon request, *C* is instituted and inducted ; after the sonne of *A* becomes healthy, and *C* is required to resigne, hee refused ; his Bond is sued, and coming into this Court for reliefe, it was denied to him, and the Bond agreed to bee good in Law and Equity, *Trin. 6.* *Car.* *Wood and Berrys case* in Chancery, *Torbill* 26. 27. But if one make a Bond not to marrie without consent of friends ; it seemes this is not good, and the Obligor will bee relieved here, *Torbill* 26. 27. Fourteenthly, One *Harris* and *J. S.* two young men needing money, came to one *King* to borrow one hundred pounds of him, who would not lend them money, but told them hee had a *Cabinet* which hee would lend them, and this cost him but one hundred and eleven pounds, and this hee lent them, and took a Bond of them to pay him four hundred pounds for it five yeares after, if *King* did live so long. *Harris* died, *King* died, the Executor of *King* sued the Bond against the other young man ; who Complained here, and it was decreed that the Executor should recover but one hundred eleven pounds upon this Bond, and no Costs

nor

nor damages, that the Suits in Law should be stayed, and the bond delivered up to bee cancelled 6 *Car.* in Chancery. Fifteenthly, If I have entred into an Engagement, and had a Release of it upon good cause, and have lost it, I shall have remedy here: But it seemeth otherwise if the debt bee by matter of Record. 22 *Ed. 4. 6. D. & St. 1. 1. ch. 12.* It hath been said if monie bee paid on a single obligation, and the Obligor hath no acquittance for his monie, that hee shall not be relieved here, *Caryes Rep.* 17. But I take it the use of the Court is otherwise at this day, and that the Obligee shall bee here forced to deliver up the Bill. Sixteenthly, If monie bee paid upon the redemption of a mortgage by indenture without taking any acquittance, it seems the Mortgagee must bring in the indenture to bee cancelled here, *Caryes Rep.* 17. Seventeenthly, The Plaintiff and his father were bound to the Defendant in 500*l.* to stand to the award of the Lord ch. Justice, who ordered that the Plaintiff who had the Reversion in Fee, and the father who had the estate for life, should make such assurance as the Defendant should reasonably devise, the Defendant tendered an assurance to the Father to bee sealed, who being old and blinde desired time to advise with his friend, the Plaintiff sealed, and his father afterwards did offer to seal, and then the Defendant said hee did not care for his seal, but hee put the bond in Suit upon the fathers refusal, and it was stayd by order of this Court, *Caryes Rep.* 105.

And if in any of these cases the party to whom such Engagement is made, make use of it in any court by way of suit against him that entred into it, he may in this Court by Injunction stay his Suit there, and shall have the matter ordered here as in Equity is fit to bee done, *Totbill* 23. *Sucklins case*, 11 *Car.* 24.

For the clearing of this point, see it in these following cases. Against the extremity of a Forfeiture in other cases. Sect. 13.
First, If there bee Tenant for life, the remainder over, and the Tenant for life doth give way to the suffering of a common Recovery, which *rigore juris* is a forfeiture of his Estate; in this case he may be relieved here, as was done in *Staffords case*, 10 *Car.* *Totbill* 184. Secondly, If I convey my land on condition to bee done by me, unless it bee in the case of a mortgage before, and I fail; I am remediless. So if I bee a Lessee

Of Land.

for life or years, and make a Feoffment of the Land, and forfeit it: in these cases if the Lord take advantage of it, there is no help for mee in Chancery: So if I doe commit waste and the land bee recovered from me, *D. & St. 176. 20 H. 6. 3. 21 H. 7. 10 Ed. 4. 6. 4 H. 6. 24. 3. Hill. 9 Car.* In Sir Edward Hungerfords and Wilsons case in Chancery, it was held, That a Lessee shall have relief in Equity, or the Grantee of the Reversion against the Lessor that doth enter for a forfeiture on the land, for not payment of the Rent; and yet if the Lease whereby the Rent is reserved bee a dishonest Lease, as gotten of the King by a false surmise, or the like, *contra, Cargys Rep. 32.* Fourthly, If a Lessee for years of land, upon a condition of forfeiture for not payment of Rent, make divers underleases, and after by agreement between him and the Lessor hee makes a forfeiture, and the Lessor enter, and then makes a new lease to the Lessee for years; in this case the under Lessees and Tenants may have Relief here against the Lessor and Lessee, upon this practise, *Crompt. Jur. 64. 65.* Fifthly, If a Lord enter upon a Copsy-holder for a forfeiture by the Copsy-holder; it seems the Copsy-holder is remediless in Law and Equity both, *Co. 4. 24.* And yet a Copsy-holder, within age, was admitted, and his custodie committed to the Mother; and her under Tenant did waste, and being presented, the Lord seized it for the forfeiture, and held it many years, and died, and his Heir held it; and yet the Copsy-holder had an order for it here till it were recovered by Law, *Master Littons case, M. 41. 42. 43 Eliz. Cargys Rep. 6.* And so where a Copsy-holder took Timber without leave of the Lord, and employed it upon the Copsy-hold, albeit this *rigore juris* be a forfeiture; yet the Copsy-holder was holpen in this Court, *Totill 46.* The Father committed a forfeiture, the Sonne was admitted; this was not allowed as a dispensation with the forfeiture in Equity as was said, and yet agreed, that if the Lord had seized a Harriot after the Fathers death, that this had been a dispensation with the forfeiture in Equitie, *Smiths case, Clarks case, Totill 45.* Sixthly, An estate in tayl was here ordered to be cut off, contrary to a Proviso in a Deed, only to make a Joyn-ture, and then the remainder to be seised as before, and that

no forfeiture should bee hereby, *Baylies case*, 38 *Eliz. To bill* 82. Seventhly, If my goods bee taken as fellons goods, upon Of Goods.
a forfeiture for felony, or as a wayfe, estray, deodand or wreck;
or bee forfeit upon an Attachment, by my not appearing in a
Court; in these cases there is no relief to bee had in Equity for
me: so upon an Outlawry in any Action, albeit it bee upon an
unjust cause, and I have no notice of it, yet I am remediless:
But if there bee any undue practise in it, haply I may have some
remedy against the Plaintiff in this Court, *D. & St. l. 2. ch. 3.*
20 *H. 6. 3.* 21 *H. 7. 7.* 35 *H. 6. 27.*

If any other courts of Justice, by their over-nice and strict
observation of the Rules of Law, doe mee injurie, I shall have
relief here; for which know these things. First, If there be any
extremities used upon a Judgement had against me in another
court for money or Land, this Court may not vacat the
Judgement, but may Order the Persons as it shall see cause in
Equitie; And so was it resolved notwithstanding the Statute
of 4 *H. 4. 23.* upon a speciall debate by the Kings command,
14 *fac.* But in cases tending to overthrow of Judgements had
in other courts, this Court neither may, nor will, examine or
revoke them; for, if so, there will bee no end, and this will
render them invalid, 37 *Ed. 3. 14.* *Dyer* 20. 27 *H. 8. 15. D. &*
Srd. l. ch. 18. Carsts Rep. 74. 75. Secondly, If one make an
Obligation in one Countie, and the Obligee sue in another,
and there recover it, it is said the Defendant may have the
Plaintiff here, and shew that by that hee lost the advantage of
pleading some truth, by which hee might have avoided the
suite, 9 *Ed. 4. 15. Cromp. Jur.* 42. Thirdly, If two Copartners
bring a *Q. Impedit*, and one count false, by covin betweene
him and the Defendant, I having damage thereby, may sue
them both here, 6 *Ed. 4. 10. Cromp. Jur.* 43. Fourthly, If a
Fine bee reversed in a Court, by inspection and proove of wit-
nesses, for nonage, and in truth hee is of full age, it seems
reliefe may bee here, and if the Conusor after reversall sell the
Land to another, the *Subpans* will lie against buyer and seller
both, *Dyer* 261. 301. *Crompt. Jur.* 66. Fifthly, If one have
Land in ancient Demesne in execution upon a Statute, and
doe after recover it there by a fained Recovery, the Partie
grieved:

Against the in-
juries of other
Courts of Ju-
stice.

Secd. 13.

Judgement.

grieved that cannot falsifie there may bee relieved here, *Crompt. Jur.* 45.6. Sixtly, If a suite bee against mee in any other court, upon an unreasonable Engagement; I may have Relief here by Injunction, *See Sect. 12. before, and Injunction at Sect.* Seventhly, If a Fine or a Recovery bee passed in the proper court, and thereby a just claime past, little hope of Relief is here, unlesse there bee some notorious practice in it; for in these cases the Court is very tender. Eighthly if another Court entertaine a Suit for Tythes not tytheable, *Prohibition* lyeth here, *F.N.B.* 41.

The Heir entring into his Fathers house, had of his goods worth five shillings, and the Defendant sued a Bond of five hundred pound against the Heir, as Executor of his own wrong, and proving hee sold or gave away the goods, a Verdict passed for the whole five hundred pounds, which appearing by the certificate of the Justices of Assize, an Injunction was granted to stay all Proceedings in this Action, and to forbid any new Action, till the Court have determined the matter, *Caryes Rep.* 49.

The Plaintiff had a Judgement for three hundred pounds and was ordered to take Execution but for two hundred pounds, *Caryes Rep.* 52. A Debt upon a single Bill satisfied, and the Bill not delivered, was sued, and Execution gotten, and the party relieved here, *21 Eliz. Owens case, Caryes Rep.* 74. If one sue here to bee discharged of a Legacie, and after the Defendant did sue for it in the spirituall Court, this Court granted an Injunction, *Caryes Rep.* 73. If one man doe unduly get a Judgement in the name of another, relief may bee had here, *Caryes Rep.* 76. And so in all such like cases where any considerable circumstance of Equity is in the case; otherwise it will bee dismissed, *Caryes Rep.* 76. The Plaintiff desired relief against an Obligation of one hundred pounds, with an insensible condition put in Suit; for that the Plaintiff being desired by the Defendant to seal a Release, hee desired time only to bee advised thereof, which the Defendant would not yeeld to, but hath put the Bond in Suit though no wayes damaged, and now is ready to seal it, and an Injunction was granted, *Caryes Rep.* 78. If one sue for Tythes of land not Tytheable;

Tytheable ; it seems relief may bee had here, *Caryes Rep.* 79. A drunken man sued for words spoken in his drink, sought for remedy here, but could have none : *Qui peccat ebrius, suus sobrius*, *Caryes Rep.* 93. The Plaintiff sought to bee relieved upon an obligation of 300.l. which hee entred into to make a Jointure to his wife in consideration of one hundred seventy four pounds promised to him by the Defendant in marriage, which was never paid to him : in this case an Injunction was ordered, *Caryes Rep.* 112. The Defendant pleaded *Non est factum* to a Bond of four hundred pounds, and it passed with the Defendant. The Plaintiff preferred his Bill, supposed hee had promised payment after the verdict, and it was received, 35 *Eliz. Suttons case, Tothill* 137.

If the Lord of a Copyhold-Mannor deny to doe right to his Tenant a Copyholder, according to the Custome of the Mannor ; the Tenant may compell him to it by the help of this Court ; wherein take these things. First, If the Copyholder will put out his Tenant that payeth and doth his services ; or if hee surrender in Court to the use of another, and the Lord refuse to admit him to whose use the surrender was made ; or will not keep Court for the benefit of his Copyholder, or exact uncertain fines, they being certain ; a *Subpœna* lyeth. Secondly, So if hee will not admit him upon a descent. Thirdly, So if hee bee ousted of his Copyhold, and the Lord will not hold a Court whereat hee may sue for his Right. Fourthly, So in case of a false Judgement upon a Petition to the Lord to redress it. Fifthly, So to compell him to grant a Licence to let it. Sixthly, A woman Copyholder for life, the Reversion is granted to two for their lives, *cum post mortem vel forisfacturam* of the woman it shall happen, and she take a husband that doth surrender to the first in Reversion, who is admitted and dyeth ; and after, the next desireth admittance, and could not have it, but the Lord entreth as an occupant, as hee might, and the husband and wife were willing to surrender to him in Reversion for life, and the Lord refusing to keep a Court, or leave the possession ; was ordered to doe both in this Court, *Tothill* 3.44.45. *Cary.* 3. *Dyer* 264. *Fitz. Subpœna* 21. *Kirch.* 82.89. *F.N.B.* 12. *Crompt. Jur.* 51.53. Seventhly,

Upon the hard dealing of the Landlord against the Tenant a Copyholder. Sec. 14.

Lands that had gone for Copyhold of inheritance allowed here till they bee recovered by Law, *Torbill* 44. 45. Eightly, A Copyhold granted by the Lord at a Court held out of the Mannor, made good against the Lord by Decree of this Court, *Torbill* 45. *Markes case*. Ninthly, *Mich. Eliz.* In Chancery the Defendant would not admit the Plaintiff to his Copyhold, under pretence that hee had forfeited it by cutting trees; but he was ordered to doe it, because he could not prove the cutting was by his directions, *Taylor's case*, *Torbill* 140. Tenthly, The reasonableness of a Fine upon a surrender shall be Judged here; a years value of the land was allowed good, *Car. Rep.* 54. El-venthly, The Court compelled the Ld. to admit his Tenant, a Copyholder, to sue at Law without any forfeiture, *Torbill* 3. and yet see before. *seft.* 12. Twelfthly, But if the Lord enter upon a Copyholder for a forfeiture by breach of the custome; no relief is to bee had here in this case, *Co. 4. 24. F.N.B.* 12. Thirtetnly, *Stone vers. Whismore Hill* 1649. The Plaintiff sued the Defendant to compell him, being Lord, to take the Plaintiffs Fine, which hee pretended was certain, and to admit him; the Defendant demurred because it did belong to Law; but it was over-ruled, and the Lord ordered to keep Court and ser the Fine, and then that a tryall bee at Law; but the costs suspended till the tryall were past: For the Plaintiff had no means in Law to compell the Lord to keep Court, &c. Fourteenthly, A custome to pay an incertain Fine at every alienation of the Lord, will not bee admitted here; otherwise it may bee to pay it at the death of the Lord: But a custome to pay Fine incertain at the death or alienation of a Copyholder, may bee good, and will bee allowed here, *Caryes Rep.* 7. Fifteenthly, But this Court doth not order for all Tenants in generall, nor for any longer time than the present; except it bee by agreement between the Lord and Tenants, which if reasonable is here decreed, *Caryes Rep.* 27.

For the Surety
against the
princip. Deb-
tor or Creditor
See. 15.

For this take these cases. First, If I bee surety for another, to pay money or to doe any other thing, and he doth it not, but suffer me to be damnified by it, in this case I may here, if I have no remedy at Law, compell him to discharge me, *D. & Sr. libi* 1. Secondly, If I be bound with *A B* to pay money at a day, and hee

he is bound to save me harmlesse, and at the day I pay the money, and then sue my counter-Bond; he may avoid this Suit at common-Law: But in this Court I may compell him to pay me the money again, *M. 31. 32. Eliz. Crom. 43. 44.* in Chancery. Thirdly, If the principall Debtor and the Creditor will by agreement without my privitie that am the Surety, continue the Debt after the first day of payment, when I doe suppose it to be paid: in this case the Court will compell the Creditor to take his reliefe of him, and discharge me, my Heirs, Executors, &c. *Myles case 5 Car. Hures case 10. Jac. Saunders case 10. Jac. Tothill 181.* Fourthly, If the principall Debtor have lands descended, and his Heir have conveyed them in trust; I may here compell the sale of them to pay the Debts, *Tothill 182.* Fifthly, If he assigne Debts, which be things in Action, to me; I may recover them here, *Tothill 182.*

If a man hold my Land from mee, I may sue him here, and suppose hee doth keep my Evidences from me; also, and put him to set forth by what Title he doth claime it; wherein are these things. First, if I have occasion to bring an Action for the Land and cannot tell the Tenant, I may sue the occupier here, and hee must shew what he or any other claymorth to his knowledge, that I may know who to sue; yet some doubt of this. The Defendant held over his term; the Court put him to shew what time his Lease was, *M. 6 Car. Tothill 183.* So the Conusee of a Statute did here force the Lessee for years to set down all the particulars of his Lease, to see whether it were extendible or not, *11 Car. Tothill 183. Tothill 20. Creswells case; Tothill 99. Caryes Rep. 16.* If one detain from me my Evidences, & they be not in any box or chest locked, and I know not the certain contents of them, so as to bring an Action at law for them, I may recover them here. For explanation take these cases. First *Wrights case, circa 28 Eliz.* in Chancery; One did exhibit his Bill for Evidences of Land, and made himself a title to the Land, and the Defendant made himselfe a title also, and justified the detaining of them; and it was referred to a tryall at Law for the title, and ordered, That he should have the evidences with whom the verdict passed, *Cromp. Jur. 44. Caryes Rep. 16.* Secondly, If the Heir happen to get Writ-

Upon a deteyner of my Lands, Deeds, or Goods, to discover and recover them.
Sec. 26.

ings, that by Law doe belong to him, but in interest to the Executor; or the Executor get writings that by Law doe belong to him, but in interest to the Heir, as Bonds or Statutes for the securing of the Land of the Heir, or the like: in these cases they may enforce the delivery of them here, *Broo. Oblig.* 18. 68. *Chastell* 6. Thirdly, If one be bound in a Bond to me for money, and he hath gotten the Bond; I may sue here for the Bond, and for the money without the Bond, *West*.

If one have any other goods of mine, and I cannot tell what they bee, I may sue for them, to Discover and Recover them in this Court, 39 *H. 6.* 16. And if I have lost my goods, and cannot tell who hath them; I may here suppose any man to have them, and put him to discover on his Oath, whether they have or know of them; and albeit the case be such that I may by a Suit at common-Law recover them, yet I may here in this Court, for preparation to that Suit, force the possessor to make and set down an Inventory of them, *Crompt. Jur.* 45. If Lands be given by one Deed severally to two men, hee that hath the Deed shall be compelled here to shew it, for the defence of the others Title, 9 *Ed.* 4. 41. If the King had granted to me all the goods of *A*, attainted by Felony, and I know not the certainty of them; yet I may compell any man that hath them to make an Inventory of them in this court, 36 *H. 6.* 26. Where Deedes doe concerne as well the Defence of the title of the Tenant for life, as of him that possesseth the Deeds, being to him in Reversion or Remainder; in this case it is usual for this court to Order them to be brought into the court, *Caryes Rep.* 19. So in such like cases, where the Land is yet in question, or the Court hath not determined who shall have it, *Caryes Rep.* 52. 18 *Eliz.* The Plaintiff sued for Tokens he had delivered to the Defendant, when he was a Suitor to her; she confessed part of them in her hand, which the Court forced her to deliver forthwith; and for the rest, that the Plaintiff left them against her will, and she delivered them to a friend of the Plaintiffs that dealt betweene them; and for that Ordered that he take his Remedy against the friend, *Caryes Rep.* 55. Where the Court doth see cause it will force the Defendant to bring the writings in court, by a *Ducens tecum*, *Caryes Rep.* 67. 43. For

For this take these cases. First, This Court would not change an estate in Fee, depending on an Estate in Tayle *Totbil* 84. Secondly, an estate in Tayle was Ordered to bee cut off, against the Proviso of a Deede, only to make a wife a Joynture, and to settle the rest as it was before, *Baylyes case*, 38 *Eliz. Totbil* 82. A, deceased, late Father to the Plaintiff, did give the Land entayled to the Father of the Defendant, reserving forty pound rent to him and his Heirs, after granted twenty five pound, part of the Rent, to the Plaintiffs for their lives; the Defendants Father did attorn and pay the Rent to the Plaintiffs, till two yeeres before his death, after the issue in Tayl refused, but was Ordered here, *Caryes Rep.* 92. A father being Tenant in tayle of Land, sells this Land, and leaves as much free land to descend to his Heir in tayle; in this case it was Ordered that the Heir shall repay the money paid by the Purchaser, according to the Fathers Will, or else the Plaintiff shall have the Fee-simple, Ruled, *Pearces case Totbil*. 183. 184.

About an estate
in tayl.

Sec. 17.

In this Court a man shall have reliefe for the recovery of his Land, Debt, or Duty, where by Law hee hath none. For the knowledge wherof take these things. First, If I have a good Title to Land, but have lost my conveyance, I may recover my land in this Court, *Caryes Rep.* 24. *Goslets case*. The Plaintiff sued to have his lease, & supposed it to end at Lady-day 1604. had it Decreed, and after, finding the lease, it did not end till 1605. after hee moved hee might continue the land till 1605. but it would not bee granted without a new Bill, *Caryes Rep.* 25. Secondly, If I have a good Title to Rent, but no means to gain it, as if it bee a Seck, and I have had no Seisin of it, or another Rent, and I have not had any attornement of the Tenant, or the Rent is by some accident without any recompence, for it, discharged, or the like, I may recover it here. So if it hath been usually paid, and I can shew no Deed of it, *Totbil* 171. 172. 77. 173. And yet some say in the case of lack of Seisin of a Rent I shall have no remedie here, *Co. upon Litt.* 159. So the Lord Keeper and Judges, *M. 1596. Caryes Rep.* 5. But a man possessed of a lease for years Devised a Rent out of it, without clause of distress, and made his wife Executrix, she

About the way
of Recovery of
Land, a Debt,
or Duty.

Sec. 18.

Rent.

Executor.

married and shee and her husband sold the lease; in this case the Court ordered the recompence to bee made by the Executor, and would not charge the land, 9 *Jac. Wars case, Tothill* 77. Thirdly, If one owe me monie on an Especialty, and I have lost it, or cannot come at it, yet if I can prove it, I may recover my monie here, *Caryes Rep.* 25. Fourthly, If I sue for, and recover a Debt at Common Law, and for Error it is reversed in the Exchequer chamber, I may after notwithstanding recover it here, *Cuttings case, 40 Eliz. Caryes Rep.* 8. Fifthly, In some cases, albeit I bee gone in point of time by the Statute of Limitation, 21 *Jac.* by not suing for it in time; yet I shall have reliefe here, especially when it hath been demanded within the time; or when it is given and directed to bee paid by Will, *Tothill* 178. 179. 53. Sixthly, An Elegit being returned and filed, and the time thereof elapsed, and yet the Plaintiff unsatisfied his Debt; hee was relieved here, and the Elegit revived, *Tothill* 179. Seventhly, This Court will order the lands extended to bee delivered to the Plaintiff in execution, and at the value it is found, *Tothill* 178. Eighthly, If the King had given forfeit goods to A, hee might have recovered it here, 39 *H.* 6. 26. Ninthly, But if Lands bee extended by a Jury much under value, and there bee no practise in the case, it seems no remedie is to bee had here; for the Debtor may help himself by payment of the monie, *Crompt. Jur.* 55. 15 *H.* 7. *Duplyes case.* And if a Defendant hath waiged his Law in an Action, and thereby the Plaintiff is barred, or a grand Jury in an Attaint doe finde with the petit Jury, though never so much against truth, and a man have twenty witnesses to disprove it, this Court will not give relief, *D. & St.* 31. *Crompt. Jur.* 49.

For this observe these cases. First, The meaning of a Will is to bee performed, and will bee ordered here, *Cobs case, Tothill* 141. Secondly, An averment of a Will not allowed by Law, will bee received here, to have the intent performed, *Tothill* 188. 189. Thirdly, Lands devised to two, to bee equally divided betwixt them and their Heirs, agreed and ordered here to bee a Tenancy in common, and the survivor denied to have all, *Tothill* 79. Fourthly, Doctor Ford; by his Will

Especially lost.

Limitation.

Barr in Action
small.

About a Devise
and how it shall
be taken and
performed in
Equity.
Sect. 19.

Will devised his Land to his wife in these words, (*non per viam fidei Comissa*) for which his sonne might sue her, but hoping that if his sonne grew thriftie, that at her death shee would leave the remnant of these leases to him; shee married *Greysall*, & before marriage he did write to her that she should dispose these leases at her death, after marriage he sells the leases; the son sues here, but had no relief, *Caryes Rep.* 22. 23.

The Plaintiffs Father, seized of land in Fee, by a *Nuncupative* Will devised three hundred pound out of his land, to bee paid to raise portions, two hours before his death, and because the father had disinherited him of other land, the Court forced him of this payment, 13 *Jac. Samburns case, Tothill* 184. The Plaintiffs father did fully resolve that he should have the lease, make a kinde of devise of it to him, divers times say that hee had given it to him, the Defendant that had the lease say and protest, as hee was a Christian man, hee should have it, offered an agreement, and to give him two hundred pound for the lease; it was decreed hee should have it, *Redmans case, 28. Eliz. Tothill* 69. A Devise void in Law, by reason of a misrecitall of a Grant, and lack of Attornment, Decreed here to bee good, *Bacons case, Tothill* 79. A breach of a condition upon a Devise, was here holpen against the Heir, *Serjeants case, 39. Eliz. Tothill* 77. If there bee a great over-plus of Estate, and no disposall thereof by the Will, this Court doth order it to the Testators kinf-folk, and to charitable uses, *Breretons case, 6 Jac. Tothill* 87. A Devise of monie to a woman, if shee would bee divorced from her husband, was Decreed good, without Divorce, *Tenants case, 6 Jac. Tothill* 78. If one possessed of a tearm Devise it to another besides the Executor, and hee have not Assets to pay Debts and sell it, there is no relief to hee had here: But if hee have enough besides, and yet sell it, the Legatee shall have relief here against him; and if the buyer did know of the Devise, the *Subpoena* shall goe against them both, but the Court will not avoid the sale; before the sale haply the Court will not avoid the sale: but before the sale happily the Court will prohibit it, *Plow.* 539. 519. See more in sect. 9. before. If *A* and *B* bee bound joyntly and severally to *C*, in a Bond of a hundred

hundred pound; and *C* gives to *A* all the Debts hee owed him: *C* died, and his Executor sued *A* for the Debts: *A* complained for relief here; in this case the Lord Keeper doubted upon the manner of the Devise only, being clear, that if the Debt had been from *A* alone, hee would have relieved him, 6 *Car.* in Chancery. If one give his leases to his wife, thus hoping that if his Son be towardsly she will leave them to him, but not that hee may sue her, and before her second marriage he promised to leave them to him; yet after the marriage hee sold them, and no remedie could bee had here, *Caryes Rep.* 23.

Upon a fraudulent practise to avoid a Lease.

On this observe these cases. First, If Lessee for yeeres demisseth parcell of the terme to another, and after, covinously forfeit his Lease for a condition broken, and then take back the land or lease again; in this case the Lessee of parcell shall be relieved here, 1 *Ed.* 44. *Crompt.* 64. 65. *Caryes Rep.* 18. See *Self.* 12. before. Secondly, if one enter into a Statute in my name, it seems I cannot avoid it here, but I shall have remedy by a Writ of *Deceit*: but if he be of my name also, I may against this avoid it by Plea, *Caryes Rep.* 22.

To avoid a debt

If, before the Statutes of fraud, the debtor had made a Deed of Gift of his goods, to defraud his Creditors, and continued the possession of them, and took Sanctuary and died there, his Executors having the goods, might be chargeable here, 16 *Ed.* 4. 9. *Caryes Rep.* 18.

If one buy goods of mee for money, and after, being a begger, and purposing to defeat mee of my Debt, gives the goods to one *J. S.*, but useth them all his life time and dies, and then his wife kept them; shee married, and her husband kept them; in this case I it seems may here sue the husband and wife upon this Covin: for they cannot be charged by Law as Executors of their own wrong, because the goods were the goods of *J. S.* in Law, 16 *Ed.* 4. 9. *Crompt. Jur.* 62. 63. Secondly, If one sue for Land, and the Defendant, hanging the suit, make secret conveyances of the Land; this Court will order him to discharge the Land thereof, *Totbil* 108. Thirdly, If a Scrivener, appointed to draw a Deed of a Farm, and all the Land belonging to it, makes it of purpose of the Farm *cum pertinentiis*, & after gets a Grant of it himself, to avoid the Deed; this court will

To avoid a conveyance.

will avoid this, *Harbins case, Tothil* '99. Fourthly, If I bee a simple man, and another, cunningly, procures mee to convey my land to him for nothing, albeit he sell it to purchasers, and a discent be cast, yet this Court will order the reassuring of the Land, *Lewis case, Tothill* 42.43. Fifthly, If goods be given to defraud Creditors, in such a case as the gift bee not avoidable by the Statutes, possibly the Party may be relieved here, 16 *Ed.* 4.9. Sixthly, If a Debtor will colude with som of his friends to deceive his Creditors, and his friends break their trust with him, it seems this court will not give relief in this case, *fallere fallentem non est fraus*; And yet sometimes the Court in this case hath ordered the goods, so conveyed by fraud to the Creditors, *Caryes Rep.* 13.7. Seventhly, If a Copy of court-Roll bee indirectly entred, the Party wronged may have relief here, and albeit the Homage find the copy true, yet this will not hinder relief, *Caryes Rep.* 55. If one sell Land, and before the Assurance made, convey it to another that knoweth of the sale, it will bee holpen here. So if hee convey it to another that hath notice, *Caryes Rep.* 82. So if hee convey it to any of his children, *Tothil.* 107.

To get a mans
Land from him

Fraud upon
Fraud.

If two Executors bee, and one of them release the Debts (as he may) and there be not enough besides to perform the Will, in this case the other Executor may sue him in Chancery; and if there be *covin* between him and the Debtor, the *Sub-pœna* may be had against them both, 4 *H.* 7. 4. *Crompt. Jur.* 106. 11 *Ed.* 4.2. And if one be bound to two in an Obligation, to the use of one of the two only, and the other release the Debt (as he may by Law) he to whose use it is, may have reliefe here, and against them both if the Debtor were privy to it, 7 *H.* 7. 11. If two have any comodity of Land or Goods together as Jointenants, or the like, and one of them take, or sell all from the other: in this case, if it be in case where he hath no remedy by Law, as in some cases of Merchants that are Partners, and in some others; the party grieved may have remedy here, *D.* & *St.* 12. 175. *Crompt. Jur.* 49. And yet in *Caryes Rep.* 21. it is said, That if one Jointenant take all the profits, the other shall have no remedie, except there bee an agreement or promise of account. If two Copartners or Jointenants joyn in

U. on falshood
in fellowship.
Sect. 20.
Executor.

Use.

Jointenants.

Executors,

a *Q. Impedit*, and the one of them plead covinously; this Court will compell him to joyn with the other in the Plea or Presentment. So if Lands bee given severally, by one Deed to two men; hee which hath the Deed, shall bee compelled to shew it for the defence of the others title, 9 *Ed. 4.* 41. *Caryes Rep.* 15. One Executor sued another, supposing that divers Goods were left with them, to bee delivered to children at their full age; And the trust and charge being joyn't which may survive, hee desires they may give Bond one to the other, that they, or if they dye, their Executors shall pay the Children their portions when they come of age; and it was thought fit to bee decreed, *Caryes Rep.* 79. Two are made Executors to the use of Children; one of them gets the Estate into his hands, makes a Testament, and gives in Legacies as much as this and all the rest of his Estate, and dyes; his Executor was ordered here first of all, out of all the estate to satisfie this Estate of the first Testator, *Wray ch. Justice case, Caryes Rep.* 86. 87.

To have Prohibition to stop and injury.

Sect. 21.

Waste,

Lease without impeachment of Waste,

Timber.

In some cases where an injury is done to me, the which is continued and increased, I may stay it here by a prohibition; as in case of some waste, by cutting down of Woods, or ploughing up of grounds; wherein take these things. First, A Prohibition was granted here to stay the ploughing of ancient Pastures by the Tenant thereof, *Torbill* 52. Secondly, The Lessee of an Estate dispunishable of waste, was here prohibited to destroy the houses, *Morgans case, Torbill* 92. At another time to doe waste in Woods and Houses, *Kings case, 4 Car. Torbill* 82. And the Lessee of such a Tenant was here forbidden to doe waste, 11 *Jac. Torbill* 82. And a Bishop made a Lease before 1 *Q. Eliz.* without impeachment of waste, which was confirmed by the Deane and Chapter. And the Lessee cut Timber, & it being moved here, the Lord Keeper said, Because the Bishop was punisshable for waste, therefore hee would forbid it, otherwise not: but hee did not forbid the sale of what was cut, *Trim. 6 Car.* the Bishop of *Sarums case*. Thirdly, Lessee for life, the remainder for life, the remainder in Fee and the first Lessee for life doe waste; in this case, albeit hee in remainder in Fee hath no remedy by the Com-

Common-Law; yet hee shall have a Prohibition to restrain him from doing more waste, *Crompt. Jur.* 48.49. *Caryes Rep.* 20. 26. Tenant in tayl after possibility of issue extinct, shall not bee restrained, *D. & Sr. l. 2. ch. 3.* Fourthly, Birch Trees in some Countries agreed to bee Timber-Trees, and here forbidden to bee cut down, 8 *Jac. Toshill* 86. Fifthly, If the Lessee of a Copyholder digg Gravel, or cut Trees, or the like, which is not waste in the Copyholder; yet hee may bee restrained, *Caryes Rep.* 63. Sixthly, Two houses adjoyning being upheld by one main wall, standing upon the Freehold of either party, and one of them hath necessary Rooms standing upon the others Kitchen, and hee went about to pull down his under Rooms, which would bee the ruine of the uper Rooms; an Injunction was granted to stay it till examination of the matter, *Caryes Rep.* 90.

This Court doth order inclosures of Common grounds when it is for common good; wherein take these cases. First, It hath ordered Colledges and the Parson of a Church to agree herunto, *Toshill*. Secondly, Because lands have been inclosed thirty years together by consent of most of the Parish; it was ordered so to continue, *Pigots case*, 4 *Jac.* And yet in 2 *Car.* in *Ingrams case*, the Court would not binde a man that did not agree to it. Thirdly, *M. 22 Jac. Triggs case*, The Court would not Decree an inclosure, because it was a Depopulation, and the Plaintiff refused to give the Defendant amends for his Common. Fourthly, If any prejudice bee to the High-ways, or any conversion of Tillage into Pasture, or such like publique prejudice by the inclosure; this Court will not order it, *Toshill* 109. 110. 111. Fifthly, The Defendant once agreeing, after disagreed, was ordered to stand to his first agreement, *Foxes case*, 13 *Car.*

A Release was pretended to bee lost, and it was deposed it had been seen; but this not allowed for truth unless he would swear that hee had seen it sealed and delivered: it is not sufficient to say, hee saw it after it was a Deed. And no Deed is to bee allowed here, unless it bee produced, or the Execution thereof proved, *Caryes Rep.* 31.

A Bill was brought against Executors to the Father, who
H h h 2 was

About an inclosure.
Sect. 22.

Deeds how to be proved here.

Accomp.
Sect. 23.

Award.

was Guardian in Soccage for the profits of the land which he had received of his Wives Childs Land, and the Plaintiff did aver they had Assets, and the Defendants demurred, because they were not privy to the Account, but were ordered to answer, *Caryes Rep.* 54. The Suit was for certain Rents, Fines, and Woodsales, received by the Defendants Testator during the Plaintiffs minority, and it appeared, that if the Plaintiff had made good proof he had been relieved : A commission was therefore awarded by consent, *Caryes Rep.* 114. And yet in the case of *Fleetwood* 21 *Eliz.* It was ordered, That if the Plaintiff did charge the Defendant by the Bill, for the Issues and Profits meerly by way of Account, then that the Defendants should not answer : but if they were charged by way of promise ; then that they should answer, *Caryes Rep.* 114. But it seems the practice is otherwise. This Court regularly will not make a void Award good : But some use it will make of it for evidence and advice, especially when an Award is final and reasonable as to all the matters in difference between them : and sometimes it will decree the very things themselves contain'd in the Award ; and then especially when the parties hands are to it, shewing their agreement to it, *Tothill* 16. And therefore a Suit being for Land about a custome, and both parties agreeing that the Judges of Assize had made an Award in it ; it was decreed that both parties should perform it, and that either party shall have Injunctions one against the other, *Burters case* 2 *Eliz.* *Caryes Rep.* 47. and in 19 *Eliz.* The Plaintiff sued to have an Award made by certain Arbitrators indifferently chosen to be performed ; for performance whereof both parties were bound one to other : One part whereof was, That if any difference should after arise, the same Arbitrators should end it ; and the Court ordered the Bill should be retained, *Barkers case*, *Caryes Rep.* 57. And 19 *Eliz.* there was a Suit to have an Award in writing made by the Lord ch. Justice, and under his hand, and the hands of the parties decreed ; and the party was called by Proccesse to shew why it should not be so, *Wakesfields case*, *Caryes Rep.* 64. And where an Award is good, there this Court will order the performance of it, and grant Injunction as occasion shall
bee

be to stay Suits against the meaning thereof, *Caryes Rep.* 106.

A Suit was brought here, and because it was for six pounds only, it was dismissed, *Marbers case*, 21 *Eliz. Caryes Rep.* 83. Another in the same year being for five pounds for Fish, was dismissed, *Richards case*, *Caryes Rep.* 100. So another being for a Rent of ten shillings by the year only, was dismissed, *Knights case*, 21 *Eliz. Caryes Rep.* 80. So also another the same year was dismissed, because the land sued for was not worth fourty shillings a year, *Townlyes case*, *Caryes Rep.* 74. So another was discharged the same year, because it appeared to bee for nothing but a liberty to dry cloaths upon a paroll-agreement only, *Hambyes case*, *Caryes Rep.* 76. And in that year also was another Suit in this Court for a Hawke and certain evidences supposed to bee in the hands of the Defendant, and the Court observing that the evidences were put in for a colour only, dismissed it, *Glasiers case*, *Caryes Rep.* 82. And yet if it be under value and for the poor of a Parish, the Court will hear it, *Caryes Rep.* 103. This Court will not order, That the Survivorship of Jointenants shall not hold place according to Law. And yet two Jointenants were, and one of them did promise the other upon his death-bed, not to take advantage of the Survivor, but to suffer it to goe to the payment of the others Debts, and thereupon hee devised part of it to pay his Debts; and this was decreed, and that the Survivor should make the Estate accordingly, *Springs case*, 21 *Eliz. Caryes Rep.* 81. And in *Mich. 7 Car.* two joynt-Purchasors were, and one of them Devised his part for payment of his Debts, and it was ordered here, *Mathers case*, *Toshill* 79. But if two Jointenants bee, and they cannot agree upon the presentment to a Church, but suffer a lapse; there is no remedy here, *D. & St. l. 2. ch. 33.* Two Jointenants, Sisters, of a lease for years, they marry, one of them dyeth, the other claimeth the whole by Survivorship; and the husband of her that is dead sued here, and pretended, that there was some secret Act done in her life by which the Jointure was severed, but the Court would not order the Defendant to answer it, *Caryes Rep.* 9.

If one have my monie, and I perceive him going out of the Land, I may by Suit stay him here till hee have given me security.

rity to pay me, upon the Statute of 5 R. 2. *ch. 2. Crompt. Jur.*
64. *Tothill* 136.

For misdemean-
nor,

This Court doth not give Remedy in criminall things, nor in case of misdemeanor, as for Perjury, Forgery, or the like: and yet for misdemeanors done in this Court, it will give Relief, and punish the offenders, as in case of Perjury in this Court, mis-carriage of a Commissioner in examination of witnesses, or any practice here by a Suit, examination of witnesses or otherwise, *Caryes Rep.* 56.63.68.72.75.90.99.56.68.

Trespasse.

Also Relief lyeth here in divers other cases, As

Treble damage

If I be Lessee for life or yeeres, and a stranger doe waste, against my will, whereby I am liable to a Suit and losse of treble damages therein, and I bring my action of Trespasse and recover treble damages against him, as I may, and after it hapneth that hee in Reversion, before hee sueth mee, dieth, so that now the Action against mee is gone; in this case the Trespasse shall have Relief here, to have again his treble damages, *D. & Sr.* 34. *Crompt. Jur.* 49. *Caryes Rep.* 2. If Tenant for life, or in the right of his wife, forfeit issues which come upon the Land after his death; the owner of the Land it seems will not be relieved here in Equity, for this is for advancement of execution of Justice, *D. & Sr.* 38. *Crompt. Jur.* 49. So, if one sued for Land here, and it appeared the Defendant had been in possession a hundred year, and it was dismissed, *Caryes Rep.* 110.

Issues.

Ux Courtshie.
Sec. 24.

A man married a co-Heir, and had children by her that are dead, and hee sued here to bee Tenant by the courtshie, the land being conveyd to them and their Heirs joyntly, and the Court refused to Decree it here, *Cowlyes case*, 20. *Jac.* So the continued possession of the Bastard *eigne* shall prevaile in Conscience as well as in Law, against the *mulier puisne*, *D. & Sr.* 154. *Caryes Rep.* 5. So, if one have waged his Law to my Action of Debt against him, though never so falsly, I can have no remedie in this Court. A Lease is made of a House and Wood, wherein it is covenanted that the Lessee shall have House-boot and Fire-boot, by which is understood that he is not to have any other purpose, but that they belong to the Lessor; and in this case the Chancery doth usually help him

To cut down
Trees.

him to it, leaving sufficient for the Lessor, *Caryes Rep.* 18.

One Poole was bound to C a Merchant, in a Statute; after upon an En-B lent Poole five hundred pound to buy a Mannor, the which gagement. hee did with this monie; and within four dayes after the Purchase, made it over to B, for the security of his 500.l. After C sued Execution of the Statute, and had the Mannor in Execution: B sued here to bee relieved in Equity, but was denied, *Crompt. Jur.* 63.

If one was seized of Copyhold land in Fee, and had two daughters, by two venters; the daughters entred and took the profits divers years together, without doing Fealties or paying Fine, or any admittance by the Court, and the eldest dyeth without issue: but it was here decreed, upon this possession, that the collaterall Heirs of the eldest, and not the sister of the half blood should have the land, and it was said, that the possession was Seisin sufficient without admittance, to make the Heir inheritable, *Dyer* 292. *Crompt. Jur.* 53. The Copyholder had a daughter by one woman, and a sonne by another woman, and hee dyed, his sonne within age, who by the Lord was committed to the Mother, who entred, and then the sonne dyed before his admittance, by paying Fine or Fealty, and the daughter sued in Chancery to bee admitted, but was denied; for it was said, The Mothers possession was his possession, *Dyer* 242. A man may at this Court recover damages for the profits of his land kept away, in some speciall cases, and for ploughing up his grounds, cutting down his Trees, and other wastes, in many cases where none may bee recovered by Law, *Toshill* 6. 5. 1. 5. 2. But where one hath right or title to land, for which hee can recover no damages for the meane occupation thereof, albeit hee may recover the land there; regularly, no remedie can bee had here, *D. & St. li* 1. *ch.* 19.

If the collaterall Ancestor of the Devisee doe release to the Disseisor, by his procurement, and die; this warrantie will bar, albeit they know right to bee in the Disseisee, and intend to barr it, and this is remediless, *Crompt. Jur.* 55. *D. & St.* 154. And if I have two sonnes, and the eldest goe beyond Sea, and is supposed to bee dead, and I die, and the younger brother entred, and alieneth the land with warrantie, and die without

Copyholders.
Posseffio fevoris
in a Copyholder.

Possession of
the Mother for
her Heirs collaterall.

Damages.

Release with
warranty to bar
a Disseisor.
Sec. 25.

out issue of his bodie, leaving no Affets to his elder brother, who is his Heir, and hee doe after return, hee shall have no remedie here, hee is barred in Law and Equity, *D. & St. chap. 39. Little. Selt. 704. 705. 707.*

Waste.

If one hold my land by covenant, and doe make waste in it, I may bee relieved against him here, *Totbill 188.* If there bee two voluntarie Deeds, usually the Court doth Decree the first; but if the last bee for payment of Debts, it doth Decree that Deede, *Totbill 54.* One sold a piece of ground wherein was a high-way, and did not except it; but it was ordered here to continue as before, *Nowels case, M. 3 Car. Woollens case, 10 Car. Totbill 70.* The contents of a Mannor being in question, it was referred to a Jury to finde as it had gone by usual reputation sixtie years past, *Caryes Rep. 24.* Parcell or not parcell was Decreed here, and the Land lying intermixt and not to be distinguished, Ordered to bee set out, notwithstanding the Defendant under the generall words of his Deed, had long enjoyed it; *Dean of Windsors case.*

High way
Awarded.

Parcell.

Estoppel.

Every Estoppel in Law, is not an Estoppel in Conscience. For, If a lawfull Heir and her sister, a Bastard, had sued out livery together, the lawfull Heir might have had remedie here, *D. & St. 34.* In these and such other like cases, where no ordinary remedie is given by the Common Law, relief may bee had here, and no where else, by way of Bill and Answer: but in cases where there is an ordinary and cleer remedie for any injury by the Common Law, this Court will not meddle with it, *39 H. 6. 26. 7 H. 7. 11.* as in divers of the cases before. And therefore in cases of titles of Commons, Wayes, or upon Customes, Prescriptions, or the like, no relief is to bee had here. And yet in *Wentworths case, 2 Eliz.* a fold, course, or common of Pasture, was Decreed, *Caryes Rep. 46.* Also in this Court one sued for common of Turberie and Pasture, and the Defendant Demurred and was over-ruled, *Caryes Rep. 64.* Also in this Court one may set out or ascertain a Common, or set out the bounds of a way, *Caryes Rep. 83. Totbill 48. 49.* A Bill allowed for a Title of Common, to examine Witnesses, and upon Publication to goe to Law; *39 Eliz. Throckmorrans case:* Nor can one sue in this Court for Debt upon a Bond or

Waies,
Commons.

Customes.
Sect. 26.

Bill,

Bill, Trespass, Slander, or the like, or to avoid a fraudulent Deed made to deceive Purchasors or Creditors; nor sue to prevent a woman of her Dowre, because her husband was *de non sane memorie* at the time of the marriage, for in these cases the Common Law giveth remedie: Nor to have the penalty upon a pœnall Statute, by way of information, 39 *Eliz. Comwards case*, *Tothill* 18. *Caryes Rep.* 57. And yet some circumstances, as lack of witnesses, or the like, may make these cases fit for the Chancery, *Tothill* 10. 39 *H.6.26.7 H.7.11. Cromp. Jur.* 65.44. *Tothill* 189. And this Court hath sometimes Decreed these things, as 6 *Eliz.* there was a Decree that the Tenant should pay his Rent, and doe his service, and the Arrears thereof, *Caryes Rep.* 52.

And in cases tending to overthrow a Maxime or fundamentall point of the Common Law; this Court is tender and will not easily admit any Suit in it: And therefore if a man *de non sane memorie* make a Deed, hee himself shall not bee received here to avoid his own Deed, *Co.4.127.* And yet a man may have relief here against his own Deed, bee it Fine, Feoffment, Release or otherwise, in case where it was unduly procured by practice, fraud or force, or without any consideration at all, *Tothill* 42. 43. *Crompt. Jur.* 53. *Dyer* 169. *See sect. 8. before*, *Tothill* 170. 171. 78. If a man doe a personall wrong, and dye, the party wronged is remediless both in Law and Equity, *Co.4.127.* And hence it is that if my goods be sold in a Market overt, and the propertie altered, I shall have no remedie in equitie, *D. & St.* 40. 7 *H.7.12.* If a woman levie a Fine with fear, and by a kind of compulsion, and so is barred; shee hath no remedie in Law or Conscience, *D. & St.* 5. To avoid a mans own Deed
Altit personalis.
Sale of goods in a Market.
Fine by a feme Covert.

If a lease bee made rendring Rent, with a clause of re-entry, the Rent is behinde, and the Lessor dye before any demand made thereof: in this case his Heir may not enter in Law, nor will this Court enable him so to doe, *D. & St. ch. 20. l. 1.* And hence it is that if a Tenant in tayl after possibility of issue extinct, commit waste; no remedie can bee had against him here, no more than in Law, *D. & St. l. 2. ch. 3.* If a man have a wife an inheretrix, and her father dyeth, and hee maketh all the speed hee can to make his entrie, but his wife dyeth before hee To have a Re-entrie.
Señ. 27.
Waste.
Tenant by the Courtesie.

- can doe it : in this case hee cannot be Tenant by the Courtesie, but for this he is remedieff in Law and Equity both, *D. & St. l. 2. ch. 15.* If a father leave his son and Heir a great Debt, and Assets in Land to pay it; he cannot avoid it in Law nor Equity, *D. & St. l. 2. 49.* And if a man make a Lease of Land to a man and his wife, rendering a greater Rent than the Land is worth, and the husband dye; the wife may choose whether shee will meddle with the Land. So if it come to Executors they may refuse it if they have not Assets besides; and this Court will not compell them to occupie the Land and pay the Rent, *D. & St. l. 21. 122.* And yet in some of the cases of this nature, sometimes some circumstances make it properly examinable in this Court.
- Heir.** Sect. 18. So also it is in cases tending to overthrow Acts of Parliament made for the publique good and generall Repose of the People: in these cases this Court will not easily admit of a complaint: And hence it is that regularly it doth not give relief to a man that is barred by a Fine with Proclamation, and no claim or common recovery, *D. & St. 40. 155. 33.* So that a woman that was a *fine* Covert when she levied the Fine, cannot come here and say she did it for fear, *D. & St. 155. Cargys Rep. 5.* And in this case also the case may be fit for Equity in some cases, as of a Fine levied by an Infant, or the like.
- Husband and Wife.** Fine. A Devise was of the Heirs third part of Lands in *capite*, and the Court Decreed it against the Heir: But it was afterward reversed as an erroneous Decree for the cause aforesaid, the case appearing in the Decree it self, *Pasch. 16 Jac.* Sir Henry *Ruswells* case. And in the cases of this nature also there doe fall out some circumstances also which make them fit to bee examinable in Equity, and in such cases they are received here: And therefore where an Act of Parliament hath been taken one way for a time, and after is taken another way; reliefe may bee in Equity for cases arising before the alteration. And in all these when a Plaintiff doth exhibite a Bill tending to any such purpose as before, if it appear to bee so in the Bill exhibited; the Defendant may demurr to it and cast it out of Court by dismissal: if it appear to bee so in the end of the case when it comes to tryall, then the Court will cast it
- Executors.**
- Recovery.**

out. And if in the inter-pleading by Bill and Answer, they fall upon an issue in Law; as Will or no Will, or the like the Court doth usually send it to Law to bee tryed.

In the Courts of the Common Law the Judges thereof doe proceed *Secundum potestatem ordinariam*: But in this Court the Judges doe proceed *Secundum potestatem absolutam*. And yet in this Court there is a two-fold Power: First, Ordinarie, which is in cases of Traverse, Recognizances, Partition, *Seire facias*, to repeal Patents, Extents, and the like; in all which they are to proceed according to the Rules of the Common Law: and so it is a Court of Record and Law. Secondly, They have another Power that is more arbitrary and unlimited; and this is used by Bill and Answer: And in the exercise of this last Power, the common method and process is, first of all, to call the Defendant in by a *Subpœna*, which is the first Writ, and is to require the Defendants appearance in this Court by a day, and under a pain, to make answer to the complaint of the Plaintiff; this is called a *Subpœna ad respondendum*.

The manner & method of proceeding in Suits by Bill & Answer in this Court,

There are divers other *Subpœnaes* serving for other uses and ends; as a *Subpœna* for costs, a *Subpœna* to hear Judgement, to make a better Answer, a *Subpœna* to rejoyn, a *Subpœna Ducens tecum* for writings, *Subpœna* to witnesses, to testify in this or in some other Courts, *Caryes Rep.* 61. 53. 113.

As touching the first of them, these things are to be known. First, This *Subpœna* may bee now had before the Bill be put in; but it was otherwise heretofore. Secondly, This must bee carefully looked to; for if there bee any mistake in the body of the Writ, it may prejudice the Plaintiff, and the Defendant may take advantage of it; otherwise it is of a mistake in the Label only. Thirdly, This Writ may bee retournable upon the common dayes of Retorn, as *Ostabis Hillarii, &c.* or it may bee upon a day certain, after the usuall Retorn, or after the great Feast, from whence the Retorn hath his name. Fourthly, This word *Proxim.* must bee added where cause requireth; as if the great Feast bee to come, then it must bee *Proxim. futur. in unum mensem*: If the Feast bee past, then it must bee *a die pasche in unum mensem proxim. futur.* and so

to other Retorns before or after the Feast dayes. Fifthly, If one have cause to sue a woman that hath a husband; the *Subpœna* must bee against them both, and may not bee against her alone, but in some speciall cases; as where hee is beyond Sea, not to bee found, or the like. Sixthly, If a single woman take out a *Subpœna* in her maiden-name, and before serving of it bee married; now shee cannot execute this *Subpœna*, and if shee doe, the Defendant will have costs of her. Seventhly, The Plaintiff must see his *Subpœna* bee true, and not counterfeited; for if so, the Defendant need not appear to it; and besides, if hee follow it, hee may have him punished that served it, if hee knew it to bee false. Eighthly, If the Defendant doe confess the having of Writings that doe belong to the Plaintiff; the Plaintiff of course may have a *Subpœna, Duces tecum*. But if the Defendant by his Answer deny them, or make title to them, this *Subpœna* is not grantable; nor is there any contempt, albeit hee doe not bring them in, nor shew cause of his refusall, *Caryes Rep.* 98. 36. 65. 64. *Collections of Chancery Orders* 1649. *West. Symb. Attorneys Academy, Cromp. Tur. To bill.*

Serving it,
when, and how
it must be done
Sect. 30.

As to the serving of a *Subpœna*, these things are to bee known. First, The manner of serving all *Subpœnaes* is much alike. Secondly, The *Subpœna ad respondendum* may bee served thus. First, Either by the Plaintiff or any other. Secondly, On the same day on which it is retornable, before noon, and before the rising of the Court; and in this case the Defendant must appear as soon as hee can, according to the distance of place; and if in the mean while, the Plaintiff get an Attachment against him, when hee appears hee may, by his oath of the truth of the case, take it off. Thirdly, It must bee served on the right person otherwise it is a misdemeanor in him that doth it: But if hee serve another of the same name unawares, it is no misdemeanor; for the party served shall be relieved by his Plea. Fourthly, This *Subpœna* must be served on the person of the Defendant, or left at his house or usuall place of Residence with one of the Family. More particularly thus: It being sealed, must bee either delivered to the party himself that is Defendant; or (as is commonly held) it must bee shewed

to him and a Billet or Labell thereof, or a Note of the day of appearance therein delivered to him: For to shew the Writ to the party, and not leave a note of the day of appearance or Labell, is not a good serving: And yet some think to shew the Defendant the Writ, and to tell him what is in it, or to let the Defendant read it, is a good serving without leaving a Billet of it: But it is not good trusting to this; For one *Meads* case was this; The Plaintiff shewed the Defendant a *Subpoena*, but held it in his hand, and said it was against him; but would not let him have, or see it, or tell him what it was, or give him any Note of it, or of his day of appearance, albeit hee desired it: And after hee shewed it him again and the Labell; but in such sort as hee could not see the return; and an Attachement was sent for the Plaintiff for this as a misdemeanor. But if the Defendant refuse to see, or receive it, this notwithstanding is a good serving; or the Writ it self must bee left at the parties usuall place of dwelling or abode, with one of that family, wife, child, servant, or some other that lives there, to bee delivered to him. Some say it is sufficient to leave a Labell of the Writ or note of the day of appearance with one of the family, without the Writ: but it is not good to trust to this; for I take it the practice is otherwise. Som say it is a good serving to leave the Writ hanging upon the door of the house where the party doth dwell, or usually reside or resort unto; and so it is doubtless if hee afterwards have it in his hand, or he were then in the house at the time, or by common presumption had notice of it; but otherwise it is not good to trust to it. And yet perhaps such a sleight serving of a *Subpoena* as before, may bee admitted to bee good enough to give the Defendant costs against the Plaintiff, if in case the Defendant appear upon it, and no Bill bee put in. And so it hath been to shew the Writ only, to serve it in the Plaintiffs name and at his Suit, not delivering Writ, Labell or Note, or day of appearance, only saying it was to appear the first day of the Term, or leave a Billet in paper only, to command one to appar in Chancery in the Kings name 17. November without shewing him the Process, being demanded, or the like. Fifthly, In some special cases, as where the Defendant is beyond Sea, or hath no place of

residence by order of the Court perhaps some other way of serving it may bee admitted ; as a *Subpœna ad audiendum judicium* was directed to bee given to his Cleark. Sixthly, If a *Subpœna* bee against husband and wife, and the husband alone is served, and hath notice that it is against him and his wife ; it seems this is a good serving of them both : And I take it, this is the practice, and that hereupon an attachment may bee had against the wife only, or both of them : See for these things *Attornies Acad. Collection of Orders, Caryes Rep.* 85. 109. 110. 106. 103. 101. 100. 96. 94. 88. 89. 91. 92. 83. 80. 78. 75. 69. 68. 64. 63. 41. 56. 58. 59. 50. 61.

Affidavit ; of the serving of it, how it must bee.

Sec. 31.

As to *Affidavit* of the serving of a *Subpœna*, take these things.

The *Affidavit* of the serving must bee made as the serving was ; For, if the *Affidavit* made doe not prove a good serving, as before, no Attachment can bee had upon it ; therefore hee must swear, that either hee did serve his person or house, in such sort as before : But if hee can swear that hee saw another so serve it, or that the partie confessed hee was served with it, or served with a *Subpœna* at the Plaintiffs Suit, or that he had the Writ in his hand, did read it, or the like, this will bee sufficient to maintain the Attachment.

Attachment.

Before a positive and certain *Affidavit* be made of the time, place, and manner of serving, and the return of the Writ, no Clerk must dare to make out an Attachment against the Defendant for not appearing : But a more sleight *Affidavit* will serve the Defendant for him to have costs against the Plaintiff, in case there bee no Bill put in, in time ; and therefore it hath been Ordered, That upon an *Affidavit*, that the Plaintiff shewed the Writ only, or that another served it in his name, and at his Suit, not leaving the Writ, Labell, or a Note of the day of appearance, or that hee left a Billet of paper only, or that the Plaintiff commanded the Defendant in the Kings name to appear such a day, or the like, should bee good enough, for the Defendant appearing, if hee finde no Bill in, to have costs.

Costs.

Commitment.

If any man served with a *Subpœna* doe in word or Deed sleight or contemn it, or abuse him that doth serve it ; upon oath made hereof hee will bee committed to the Fleet. See for all

all these things in the Attorneys Academy. 4. Collection of Orders of Chancery, *Crompt. Jurisd. Cargies Rep.* 110.91.92.81.80.78. 72.76.74.75.73.69.38.52.53.59.

If the Party required to come in by the *Subpæna*, doe not *Attachment*. appear, or appearing doth not Answer, or doth not Answer sufficiently ; an Attachment shall goe forth of course against him, to arrest his body : But this Writ doth lie in divers other cases, as where one abuleth him that doth serve a *Subpæna*, refuseth to pay costs, or to obey a Decree or Order of the Court, where one doth mis-demean himself in the serving of a *Subpæna*, not letting the partie see it, &c. where a witnesse refuseth to appear in the Court or Countrey, to be examined, where a Commissioner doth misdemean himself in the execution of the Commission, and in divers other cases, *Cargies Rep.* 53.72. 59.96.103.104.113.38.61.92.58.80.81.

As touching the Attachment in the first case, these things are to be known. First, This Writ cannot be duly had but where there is first a *Subpæna* duly had and served ; for if the *Subpæna* be counterfeited, or if true and not duly served ; this Writ is unduely obtained, and the Defendant arrested by it upon disclosing the matter to the Court, will be discharged thereof. Secondly, what serving of the *Subpæna* and *Affidavit* made thereof, will be sufficient to warrant the Attachment, *See Sect.* 31. Thirdly, If the Defendant doe appear, and doe not Answer, in the time given him to put in his Answer, or if no day be set by Rule, then if he answer not during the Term, nor shew cause to the Court, to excuse his delay, then this Writ shall goe out against him. Fourthly, No Attachment can be had for not appearing till the Bill be put in, and the day of the Return of the *Subpæna* be past. Fifthly, No clerk may issue out this Writ for not appearing, but upon a positive and certain *Affidavit* of the day and place of serving the *Subpæna*, and the time of the Return thereof, whereby it may appear, if it be in London or within twenty miles of it, he was served four daies, excluding the day of serving, and if upon twenty miles then eight daies before the Attachment entred. Sixthly, If a *Subpæna* be against husband and wife, and the husband alone is served with it ; and he appear and answer,

answer, but shee doth not; it seemes in this case the course is to take an Attachment against the husband and wife, or the wife alone, as the Plaintiff pleaseth. Seventhly, When hee comes in, or is brought in upon this Writ, hee is to be committed to the Fleete for a time. Eighthly, This Proccesse, and all other Proccesses of contempt, must bee sued out in the county in which the Party is resident, unlesse it bee in and about London, and if it be otherwise, the Party will bee discharged of the Proccesse, and have costs to be taxed of course by the six-clearks. Ninthly, If this or any other Proccesse of contempt be unduly gotten, the court being informed hereof will discharge it. Tenthly, An Attachment duly gotten, for not appearing, may not be discharged till the Defendant have first paid 20. s. costs, if the serving of the *Subpœna* were upon his person, otherwise 10. s. and every succeeding Proccesse double so much, and upon payment hereof he is to be discharged of course. Eleventhly, no Attachment can be had against a dumb and senselesse man; nor any other Proccesse of contempt for not answering, without Order of the court, *Collection of Chancery Orders, Cromp. Jur. of Courts. Caryes Rep. 31.72.79.94.95.104.69.106.110.93. Tothill 15.*

Twelfthly, for illustration of these Rules take these examples. First, The husband appeared and the wife not, an Attachment went out against them both, *Abells case, 19 Eliz. Caryes Rep. 65.* So he alone appeared and put in a Demurrer, in both their names, without any excuse for her; Attachment went against both, *Spicers case, Caryes Rep. 39.* Secondly, The Defendant made Oath he could not answer without sight of Evidences, and got time, and then put in a Demurrer, and this Writ went against him, *Palch. 21 Eliz. Farmers case.* Thirdly, an Attachment went against an Infant, to make him chooseth his Guardian, *Hill. 7 Car. Savills case.* Fourthly, *John Cleg* was served with a *Subpœna*, by the name of *Robert Cleg*, and one made oath hee served the *Subpœna* on *Robert Cleg*, & hereupon an Attachment went against *John Cleg*, but being made appeare, hee was discharged, *20 Eliz. Caryes Rep. 73.* Fifthly, The Defendant made Oath the Plaintiff shewed him a *Subpœna* holding it in his hand, and said it was against

against him, but would not let him have it or see it, so as hee might read it; nor would hee deliver him any note of the day of appearing, nor tell him the same; and after hee came again to him, and said, You desire to see the *Subpoena*, here it is; and then shewed him the Labell, but so as hee could not see the Return: In this case the Defendant appeared, and no Bill being in, hee had an Attachement against the Plaintiff for this misdemeanor, *Meads case*, 22 *Eliz. Cargyes Rep.* 96.

If the party required to appear by the *Subpoena* and against whom this Writ of Attachement issueth, doe not appear upon the Attachement, and the Sheriff doe thereupon return (as he must) a *Non est inventus*, then will goe forth against him a Proclamation of Rebellion; wherein are these things to bee known. First, The party that sueth out this Writ or any other Process of contempt, must doe his endeavor to get it executed, otherwise hee is to lose the benefit of it and pay costs. Secondly, All Attachements in Process shall bee discharged upon the Defendants payment, or tender to, and refusall of, by the Plaintiffs Clerk of the ordinary costs of Court, and filing of his Plea, Answer, and Demurrer, as the case is, without any motion in Court; and if the Plaintiff doe prosecute the contempt afterwards, the Defendant will bee discharged with costs. Thirdly, If the Sheriff doe not return an Attachment, a day will bee given; and if then hee doe it not, hee will bee amerced. Fourthly, If the Sheriff make a false Return, the Court will Amerce him, as if hee return him *Non est inventus* when hee hath been in his company after the receipt of the Writ. Fifthly, If this Process issue out unduly; as for not Answering when a perfect Answer is put in, or the like, and the party bee taken upon it; upon shewing the Case to the Court hee will bee discharged, *Cargyes Rep.* 44. 77. 78. *Collection of Ord. Totbill* 15.

If the party Warned, Attached, and Proclaimed, come not in now, but stand out in contempt; a Commission of Rebellion will issue out against him to apprehend him and bring him to the Fleet; wherein these things are to bee known. First, This is sometimes directed to the Sheriff, and sometimes to

Attachement
with Procla-
mation.
Sec. 32.

Commission of
Rebellion.
Sec. 33.

- private persons. Secondly, This course also is to be taken against them that refuse to obey Orders or Decrees, to pay costs and the like. Thirdly, If these Commissioners suffer the contemner to escape, they will be committed till they bring him in : And if a Rescue be made, the Rescuer will be committed : And in *Trin* 18 *Jac.* in *Nelsons* case upon a wilfull escape the Commissioners were committed till they paid the Debt.
- Fourthly, If yet the party appear not, a Serjeant of Armes may be sent to take him ; and if he cannot take him, or hee escape or resist him, and persist in his contempt, a Sequestration may be had of his Land : And if the Suit be for Land, a Sequestration and Injunction for the profits to be delivered to the Plaintiff by the Sheriff, or by other Commissioners appointed for that purpose, *Caryes Rep.* 38. 70. 58. 105. 106. 109.
- The Bill is the Plaintiffs Declaration, conteyning the cause of his complaint, as to which these things are to bee known. First, The Bill may at this day be put in after the *Subpœna* is taken out and served. Secondly, Two Bills may bee put in upon one *Subpœna*, and the Defendant must Answer them both, so as they be not for one and the same cause ; but if two Bills be put in for one cause, one of them may be dismissed with costs. Thirdly, The Bill and all the rest of the Pleadings that follow it, must be short, and not stuff with repetitions of Deeds or Records, *in hac verba*, but the substance of so much thereof as is pertinent and materiall, and that in brief terms, without needlesse or long traverses, tautologies or impertinencies. Fourthly, It must not contain any criminall or scandalous matter against the Defendant, or any other ; and if it doe, and concern the Defendant, he may refuse to answer it ; the Plaintiff and his counsell may be punished for it, and the partie grieved may recover costs. Fifthly, It is usual to insert these words in it ; *That the Plaintiff hath no remedie in Law* : but it is good without them. Sixthly, In some cases and times counsell's hand must be put to it, and he must see he doe not signe it before he hath seen and perused it ; And if any counsellors name bee put to it, he not privie to it, it may be dismissed for this. Seventhly, It must, for the matter of it, be such as the Court doth allow of, or otherwise it will
- Esc. pe.
Commitment.
Serjeant.
Sequestration.
Injunction.
Bill.
Sect. 34.
Costs.
Dismissed.

will bee dismissed. See for this before, *Caryes Rep.* 59. 74. 82. 83. 89. 112.

For this take these things. First, If the *Subpæna* bee retornable on a common day of Retorn, the Plaintiff hath time to put in his Bill untill the second day before noon next following the fourth day after every of the Retornes, the Retorn day and the fourth day being reckoned for two of the four. But if the *Subpæna* bee retornable on a day of the moneth certain, then the Bill must bee put in the second day after it, before dinner, otherwise the Defendant shewing the *Subpæna*, or Labell, or Billet of paper thereof, wherewith hee was served, or if he had not any, or hath lost it (as it seems) if he can make oath of his serving therewith, he may bee discharged and shall have costs to bee taxed by a Master of the Court; and in this case, and for this purpose only, there need such an exact serving of the *Subpæna* to bee proved, as where one is to have an Attachement against the Defendant: But then hee must prefer his costs according to the rules of the Court. Secondly, All these Rules must bee entred with the Register. Thirdly, A Bill well made and put in, may afterwards for good causes bee abated, *Attorneys Acad. Tothill, Caryes Rep.* 22. 72. 74. 69.

For further illustration hereof take these things. First, The Plaintiff, as sole Executor to *J S*, exhibited a Bill against the Defendant for the same matter, for which the Plaintiff and *J D*, as Executors to the same *J S*, exhibited another Bill, and it was referred to bee examined if for one cause, and if so, ordered that one bee dismissed with costs, *Maunder's case*, 22 *Eliz. Caryes Rep.* 88. Secondly, The Plaintiff served the two Defendants with one *Subpæna*, but exhibited two Bills, the Defendants appeared and answered one, and departed; an Attachement went out, ordered upon Answer of the second Bill to bee discharged, *Aprices case*, 21 *Eliz. Caryes Rep.* 87.

If a Plaintiff, after his Bill is in, die; his Heir, Executor, or Administrator, who hath the interest of the thing complained for, may by a new Bill of Reviver against the Defendant, or if hee bee dead, against his Heir, Executor or Administrator, as the case is, revive the Suit: For the further opening

When it must be put in.

434 ante.

Costs.

Abatement.

Bill of Reviver.
Sect. 35.

ing whereof take this. First, If the husband and wife be sued for somewhat that doth wholly concern her, and they answer; then hee dieth: the Plaintiff must have this Bill, and she may, if shee will, answer it *de novo*, and not be bound to her former answer, or she may abide by that, if shee will. Secondly, If a Bill be preferred against a single woman, and then she answer, and after marry, in this case there shall not need a Bill of Reviver, but the husband shall be concluded. But if shee were Plaintiff, and after her Bill in & the Defendants Answer, shee marry; in this case they cannot proceed without a Bill of Reviver: and yet if the Plaintiff marry before Answer, and no advantage be taken of it, it seems there needs no Bill of Reviver. And if husband and wife exhibit a Bill, and after answer made to it, the husband die, the wife may have a new Bill or proceed upon the old, which she will. Thirdly, If two be seized of joynt Estates, or Executors of one Will, or Obligees, or Obligors prefer a Bill, to which the Defendant answered, and one of them die; the Survivor may proceed without any new Bill of Reviver. Fourthly, The Bill of Reviver must pursue the first Bill; for if there be any variance between them, the Defendant may be discharged and the Bill dissolved. Fifthly, If Administrators, in nature of a Guardian to an infant-Executor, sue on his behalf, and hanging the Suit the infant comes to age, it seems there needs no Bill of Reviver. Sixthly, The Complainant, after this new Bill put in, and a *Subpoena* thereupon served, will be in the same case as his Predecessor was when the Bill first accrued, unless some cause to the contrary, as that hee is not Executor or the like, can be shewed, *Attorneys Academy, Tathill, Cargies Rep. 53. 57. 62. 70. 22. 55.*

Appearance.

As touching this, these things are to be known. First, The Defendant must appear, and at the time prefixed, otherwise an Attachment will issue out against him. Secondly, If the day of appearance be the last Return day of the Term, hee shall have time then to appear till the first Return day of the next Term. Thirdly, How and when hee must appear. See further in the following Question, when hee is to put in his Answer.

Dedimus potestatem, or,

A *Dedimus Potestatem*, is a Commission to certain persons,

to

to enable them to take the Defendants Answer in the County; wherein there are these things to bee known. First, It may be generall, to take the Defendants Answer; or speciall, to take his Answer, Plea, or Demurrer. Secondly, This Commission was heretofore grantable only upon Oath, that the Defendant was not able to travell, or the like, or esse upon speciall motion; but at this day it is grantable of course to every Defendant that will have it. Thirdly, And yet at this day if an Answer bee upon Reference reported to bee insufficient, no new Commission can bee had without payment first of fifty shillings costs, and oath made of the Defendants unablens to travell, or other speciall cause, motion and order of the Court. Fourthly, So also if the Defendant stand in contempt till the return of the Attachment with Proclamation; in this case this Commission cannot bee had, but by speciall order, upon a Motion. Fifthly, So if a Defendant once get a time to answer because of the length of the Bill, lack of writings, or the like cause; in these cases he cannot after have a *Decimus potestatem* to take his Answer, without speciall order of the Court, upon a Motion or assent of the Plaintiff under his hand. Sixthly, So neither after once this Commission is granted, no second Commission shall be granted without order of the Court upon a Motion. Seventhly, The causes of the granting of this must bee entred with the Register. Eighthly, If the party refuse to Answer, the Commissioners must certifie his refusal and the causes. This Commission executed thus; the Answer being ingrossed in parchment; is filed to the back of the Commission, and the Defendants answer sent inclosed in the Commission, with these words indorsed on the Commission *Executio istius Brevis*, or, *Commissionis, patet in quibusdam Schedulis eidem annexis*, with the Commissioners names, thus: *S. W. S. } A. B. }*

And underneath the Answer are these words; *Capitulum apud Strand in Com. Gloucest. die Martij A.D. 1650. } S. W. S. } A. B. }*

Carys Rep. to 8. 36. 53. 83. 81. 82. 79.

The Defendants answer is the Plea or Defence bee makes to the Plaintiffs Bill, in which these things must bee known.

Commission to take an Answer
Sect. 36.

Answer.
Sect. 37.

First, The Defendant is not bound to answer till the Bill bee perfect. It must be (as is said of the Bill before) short, and not scandalous, &c. Thirdly, an Answer to a matter charged as the Defendants own act, and to be done but seven yeares before, must be direct, without saying to his remembrance, or as he beleeveeth, &c. unlessse the court upon exception taken shall find speciall cause to dispense with so positive an answer. Fourthly, It must confesse, or confesse and avoid, or deny and traverse all the materiall parts of the Bill. Fifthly, If the Defendant deny a thing, he must Traverse or deny it, as the cause requireth, directly, and not by way of *negativa pregnant*; as when a thing is said in the Bill to be done with all his circumstances, the Defendant must not Traverse it literally, but the substance of it only; as if it charge him with receipt of one hundred pounds, &c. hee must say hee did not receive it, or any part of it; or else say what part hee hath received. Sixthly, Councell must not put their hands to answers they have not seen and perused. Seventhly, If three Executors bee Defendants and one of them appeareth; hee shall not bee compelled to answer till the rest appear, if the charge of the Bill bee joynt. Eighthly, Where a Trust is confessed, upon the answer there needs no further Examination of the Cause; but a Reference upon the Accounts, and so to a Hearing.

When it must
be put in.

As to this point take these things. First, When the Defendant appeareth, the Plaintiff may give him a Rule on the morrow after the costs day, to answer his Bill that day sevensnight; so that he hath seven dayes to answer, in which time hee must answer or shew cause sufficient, of his delay. Secondly, This may bee delayed upon the Defendants Oath, that hee cannot answer directly without sight of evidences in the countrey, or speech with some body there named in the Bill, or concerned in the matter; or that the Defendant is not able to travell; wherupon the Court giveth a day as it pleaseth; and without motion and order by the Court, this is not done: But the delay by granting of a *Dedimus potestatem* is of course and without Oath, and cannot bee denied. Thirdly, If no Rule bee given, the Defendant hath time to answer all the

Term.

Term. Fourthly, If the *Subpoena* bee returnable so neer the end of the Term, that there can no day bee given by Rule to Answer, or at a day certain (though the last day but one of the Term :) Or if it be returnable immediately, and bee served on the last day of the Term, before the rising of the Court : in all these cases hee must answer by that day seven dayes, at his perill ; but if it bee the last Return day of the Term, hee may appear and answer the first Return of the next Term. Fifthly, Where the Defendant doth get time by a *Dedimus Possessum*, or otherwise, hee must see his answer bee in before the day after the first costs day of the next Term following, unless it be Trinity Term ; and then in the second day. Sixthly, If one stand out a contempt to a Proclamation of Rebellion, and the same bee returned ; no answer may be made by Commission, but upon *Affidavit* of disability to travell, or other good matter, and order of Court thereupon made. Seventhly, These causes of the Attachement and Attachement must bee entered with the Register. Eighthly, When a man doth willfully refuse to answer and stand out all the Process of contempt ; the Court will take the matter of the Bill *pro confesso*, and decree it, *Tailbill* 99. Ninthly, If the answer bee good to common intent, the Plaintiff must reply and prove the matter, if he can, and not stand upon the insufficiency of the answer. Tenthly, No exception can bee taken to the answer after the Replication put in ; for it is then admitted to bee good ; but before, it may bee excepted against : but then the causes must bee shewed in writing, and delivered in to the Plaintiffs Attorney or Councell the same Term, the answer is put in ; or eight dayes after ; and if hee amend it in eight dayes, hee is to pay no costs.

Eleventhly, It must bee referred to a Master, and if hee certify it insufficient, the Plaintiff may take out Process for costs, and his answer is not to bee received till it bee paid : And the first answer being returned insufficient, hee must pay fourty shillings costs ; if it come in by Commission fifty shillings ; the second answer three pounds, the third five pounds costs, and thereupon a *Subpoena* for costs, and to make better answer. But in these cases the point to bee insisted on, are the insufficiencies in the same exception, and no new exceptions may be moved ;

Attachmenr.
Sec. 38.

Exception.

Costs.

moved; but if the Master find the answer sufficient, the Plaintiff must pay forty shillings costs. Twelfthly, If the Defendant within the time appointed can satisfy the Plaintiff, the exceptions are not good; or will pay twenty shillings costs and make a better answer; the Plaintiff may reply. Thirteenthly, If the exceptions be put in after the Term, the Plaintiff shall have time to answer them till the fourth day of the next Term unless the Court hasten it. If the answer come in by Commission be naught, no new Commission but upon oath of inability will be admitted, and payment of fifty shillings costs. Fourteenthly, If no answer be put in; or the answer be not put in in due time, an Attachment will issue out of course, and the Defendant if he be served in person, must pay twenty shillings costs, if otherwise ten shillings, and every Process afterwards double so much. Fifteenthly, If the cause goe to hearing upon the answer, the same must be admitted to be true in all points, and no other evidence is to be admitted but matter of Record, to which the answer doth refer, and which is proveable by the Record it self, *Carys Rep.* 78. 30. 8 *Ed.* 4. 5. *Cary* 27. 93. 89. 112.

Demurrer.
Plea.

Sec. 39.

How it must be
drawn.

As to these two things this must be known. First, The Demurrer is always upon matter defective contained in the Bill, or forraign matter. The Plea is of forraign matter, and it may be to the jurisdiction of the Court, or in disability of the person; That the Plaintiff is outlawed or excommunicate, or that there is another Bill depending in this or another Court for the same cause; That the cause hath beene formerly dismissed in this Court, or the like; or this. If the matter of it appeare upon Record, may be put in without oath, otherwise not. Secondly, It must expresse the causes of the Demurrer, if it be a Demurrer; yet other causes may be stood upon at the determination thereof by the Court. Thirdly, This might not heretofore have been put in upon a *Demimus*, but now it may; and he hath the same liberty to Answer, Plead or Demur, as if he had appeared in person: only this; If it bee over-ruled the Defendant shall pay five marks costs, and if it be allowed; the Defendant shall have no costs. Fourthly, this Plea or Demurrer must be received though not put in by the Defendant in person

person, or by Commission; but put in by his counsell. Fifthly, If one plead a Plea that is insufficient, and so over-ruled as an out-lawry, where it is not a good Plea hee shall pay five Marks costs; excommunication could not bee pleaded, but under seal of the Ordinarie; nor can an out-lawrie be pleaded without pleading the Record, *sub pede sigilli*. Seventhly, A Plea of outlawrie, if it bee in a Suit for the same thing for which hee seeketh relief here, is not allowed; otherwise it is while it is of force. But being reversed, the Plaintiff upon payment of twenty shillings costs, may by a new *Subpoena* put him to Answer the same Bill: and if the Plaintiff think the Plea for matter or manner, naught; hee may put it to the Judgement of the Court. Eighthly, Upon the pleading of a former Suit, it need not bee set down with the Register, but the same shall be referred to a Master to certifie, which if hee doth (and the Plaintiff must procure it within a moneth) against the Plaintiff, hee must pay five pounds costs: If there bee no report within a moneth of filing the Plea, the Bill is to bee dismissed of course with seven nobles costs. So where the Plea is a Suit in another Court for the same cause, the proceeding shall bee after the same method. Ninthly, If the Demurrer bee upon any slip or mistake in the Bill; the Plaintiff of course, laying down to the Attorney twenty shillings costs, may amend his Bill within eight dayes after the Demurrer put in, but not after that time. Tenthly, If the Demurrer bee admitted to bee good by the Plaintiff within eight dayes after the filing of it, and hee pay the Defendant fourty shillings costs; it shall bee dismissed of course, unless both sides agree to mend the Bill: But this dismissal must be no barr to a new Bill. Eleventhly, No Demurrer or other part of the Pleading, shall bee said to bee of Record or effectually, till it bee filed where it ought to remain; and a Demurrer must bee entred with the Register within eight dayes after the filing thereof; being disallowed, the Defendant must pay five marks costs, and cannot re-plead without a motion; and the Plaintiff may have his costs of five marks. Twelfthly, Every Demurrer and Plea, grounded on the substance of the matter, or extending the Jurisdiction of the Court, shall bee determined in open Court. Thir-

Excommunication.

Outlawrie.

Former Suit.

Costs.

Omission.

teenthly, And if the Demurrers and Pleas be destructive to the Suit, they are first to bee heard on the dayes of Orders. Fourteenthly, The Plaintiff may, if he find there be sufficient ground for an Order in the Answer, thereupon goe to hearing. But if the Court find it not enough, the Bill shall bee dismissed with costs; or if the Plaintiff desire it, and pay down five pounds costs, in four dayes he may reply: But after the four dayes it is too late; and this dismissal will be a good plea in bar of any new Bill for the same cause. Fifteenthly, And if a Plaintiff goe to proofs, and upon the hearing it doth appear, That the Plaintiff might have had as full relief on Bill and Answer, albeit he be relieved in the cause, yet he shall not have, but pay costs: See for all these things of Answers, Demurrers and Pleas, *Collection of Chancery Orders* 16. 49. *Totbill, Cromp. Jur. Cargies Rep.* 87. 39.

Costs.

And for further illustration hereof, take these following cases. First, *Daniel Hill* having put in for his Client a long insufficient Demurrer to a Bill, in which Demurrer were many matters of fact, and other things, frivolous and vain; the Court gave the Plaintiff five pounds costs, and Ordered that no pleadings should ever after be received under his hand in this Court: *1 Jac. Cary.* 27. Secondly, A Bill was put in by *J. S.* Supravisor of the last Will of *W.*, and another of that name was served with the Proccesse that was not the man himself, who indeed was dead; and the Court Ordered, That the Defendant shall put in his case by way of Answer upon oath, and then demand Judgement whether he shall be compelled to answer or not, and so pray costs for the vexation, which will be allowed, *Harisons case* 19 *Eliz. Cargies Rep.* 61. Thirdly, the Plaintiff put in two Bills, having served only one Subpoena, and the Defendant was Ordered to answer both of them, *Ap Rices case*, 21 *Eliz. Cargies Rep.* 87. Fourthly, The Defendant demurred generally, without shewing any manner of cause, and the Court ordered a Subpoena to make a better answer, *Duffields case*, 21 *Eliz. Cargies Rep.* 88. 87. and *Peachies case*, 21 *Eliz. Cargies Rep.* 113. and again 107. Fifthly, a woman that had a husband parted from her, sued alone for maintenance set apart for her by the husbands agreement,

Costs.

ment, and put into anothers hand : hee demurred because shee sued without the husband, and it was allowed to bee good, *Walgraves case, Caryes Rep.* 87. Sixthly, The Defendant made oath, that hee could not Answer without sight of Evidences in the Country, and having day given him, hee put in no Answer but a Demurrer ; and an Attachment was awarded against him, *Farmers case, 21 Eliz. Caryes Rep.* 110. Seventhly, The Defendant refuseth to answer the receipt of Rent, and Demurred, for that the Plaintiff had remedy by Law ; but it was over-ruled and he put to make a better Answer by *Subpoena, Dixes case, Caryes Rep.* 71. Eightly, The Plaintiff shewed that the copy of Court-Roll, whereby the Defendant pretended title, was indirectly entred by the Stewards Clerk of the Mannor ; to this the Defendant demurred, pretending hee shall not bee received to impeach the Court-Rolls : and saith further, The homage found the Copy to bee true ; and it was over-ruled, that a better answer must bee made, *Holders case, 18 Eliz. Caryes Rep.* 55.

The Replication is the Plaintiffs Speech to the Defendants Answer : the Rejoynder is the Defendants answer to the Plaintiffs Replication : the Surrejoynder is a second Defence to the Plaintiffs Action, opposite to the Defendants Rejoynder ; touching all which, these things are to bee known. First, The Replication must bee short, and avoid superfluous and criminous matter. Secondly, It must affirm and pursue the Bill, and confesse and avoid, traverse or deny the Answer. Thirdly, The Rejoynder must pursue and confirm the Answer, and must sufficiently confesse and avoid, or traverse every materiall part of the Replication. Fourthly, No new matter must bee put into the Replication, and so much matter only is to bee there, as to avoid the matter of the Answer. Fifthly, If upon the Answer there bee so much confessed, that the Plaintiff need not draw into pleading and proof all the points, hee must see to it, and reply and goe to proof only in those particulars in question and necessary to bee proved. Sixthly, When the Defendant doth demur or disclaim, the Plaintiff is not to reply. And if in these cases a *Subpoena, ad rejun- gendum* issue out, the Plaintiff will have costs against the Defen-

Replication,
Rejoynder,
Surrejoynder,
&c.

Sec. 40.

How it must be;

dant for the unjust vexation. Seventhly, When the Parties cannot come to issue by reason of some new matter disclosed in the Defendants Rejoinder, that requireth answer; the Plaintiff may Surrejoyn to the Rejoinder, and the Defendant likewise to the Surrejoinder, if there bee cause.

When put in.

For this matter, take these things. First, When a Defendant hath answered, the Plaintiff hath time for all that Term and all the next Term, and untill the beginning of the second Term following, to Reply. Secondly, The next Term after the answer put in, the Defendant may give the Plaintiff a Rule to reply; which if hee doth not, costs will bee awarded against him. And if hee give no Rule, and the Plaintiff doe not reply the second Term after the Term the answer is put in, the Bill will bee dismissed with costs of course. But if the Replication bee in Court, the Defendant can have no costs. Thirdly, The Defendant may, if hee will, Rejoyn *gratis* to the Replication, and force the Complainant to goe to Commission. Fourthly, The Plaintiff must serve the Defendant with a *Subpœna* to Rejoyn, ere hee can have a Commission to examine witnesses: And upon the return of the *Subpœna ad Rejoingendum*, and oath made of serving it, the Plaintiff may, by entering of Rules, force the Defendant to Rejoyn, and joyn in Commission, or goe on without him; for hee may give him seven dayes to Rejoyn, and if hee doe not in that time, he cannot doe it after: For if the Defendant being served with this *Subpœna*, doe not upon request by the Plaintiffs Clerk made to the Defendants Clerk, deliver Commissioners names by the end of that Term wherein this *Subpœna* is returnable; the Plaintiff may without Motion or Petition give names and take a Commission *Ex parte*, *Cargess. Rep. 111. West. Symb. Collection of Chancery Orders.*

Dismission.
Costs,

Commission to
examine wit-
nesses.

Sect. 41.

As concerning Commissions to examine witnesses, take these things. First, The Plaintiff is to have first the taking out and carriage of the Commission, as oft as any is sued out; and hee or his Commissioners must give either in person, or by a note in writing left at the place of the usuall abode of the other party, fourteen dayes notice to him of the time and place of the execution thereof: And if by any default of the Plaintiff

or

or his Commissioners it bee not then executed, hee must pay the Defendant such colts as hee, upon his oath, shall make it appear he was put to ; and the Plaintiff must renew the Commission at his own Charge, and the other side shall have the carriage of it. And so on the other side shall the Plaintiff have, if the Defendant have the carriage of the Commission, and it be lost by default of his side; but if it be lost by any error of the Clerk in making of it, the colts shall bee born by him and that side for whom it was taken out. And if the Defendant have the carriage of the Commission, hee must give notice to the Plaintiff as aforesaid : and if such notice be not given, either all the Examination will be quashed, or a Commission *Ex parte* will be granted to the other side. And if the Plaintiff refuse to goe to Commission, the Defendant may have a Commission *Ex parte*, and Commissioners of his own naming, and goe on alone in it without notice giving; and yet in this case the Plaintiff may, if hee will, name commissioners and joyn with him. Secondly, No Commission can bee granted or renewed after publication of Witnesses, without order. Thirdly, No Commission to examine witnesses may bee discharged upon a bare Petition without Reference and Certificate upon it. Fourthly, If all the witnesses bee not examined on the one side, that side cannot have a new Commission, but by consent, or by order after cause shewed upon oath, and colts payed, and then that side must bear all the charge of the new Commission, unless that side will examine any new witnesses, and then the charge shall bee born indifferently between them ; or otherwise hee may cross-examine the witnesses the other doth examine. Fifthly, If the Commission bee caused to bee renewed at the request of a Defendant, because of any default of his or his Commissioners, or because hee did not examine all his witnesses, hee must then take care hee doe it by the Return day ; for after that day hee can examine none but by speciall order. Sixthly, If the one side doe at the Commission taken out by consent, put in no Interrogatories ; nor examine any witnesses, hee shall never after have a new Commission, but upon a motion, and by order of the Court. Seventhly, If the Defendant did serve his witnesses, and they did not appear,

the Defendant may have a new Commission, *Caryes Rep.* 91.
 43. III. *Totbill, Cromp. Jur. Attorneys Academy, Collection*
of Chancery Orders.

Commissioners
 or Examiners.

As to Commissioners, First, as to their choyce. First, they must be indifferent. Secondly, The manner of choosing them is to offer four names on a side, and the other side to except against two of them. Thirdly, the usuall causes of exception are, that he is of kin, a Master or Landlord to the Partie, or that he is of his counsell or Attorney for him, or one to whom he is indebted, or one that hath a suit with the adverse Party.

Secondly, As to their duty, these things. First, They must call the witnesses before them, in due time and place, and if they appear not, an Attachment will issue out against them, unlessse they be impotent, and then a commission shall goe to examine them where they be : But they will have costs ere they answer : If they appear they must be examined. Secondly, Commissioners and Examiners must examine themselves, and not trust Clearks or others to doe it ; hold the witnesses to the point, examine them to one Interrogatorie at a time, and answer that first and at one time, take their sayings from them and not let them set it down themselves upon sight of all the Interrogatories ; but upon better thoughts they may suffer them to amend their Examination ; ask no idle questions, nor set down impertinent answers ; set down truly their sayings in Parchment ; set their hands to every schedule Examination, and send them up into the Court as they are taken, with a Certificate ; and if they meet with any obstruction in the work, they must certifie it also : and this one of them must deliver in Court, or they must send it by one that must make oath, that he received it from one of their hands, and that it is not altered to his knowledge. Thirdly, If any misdemeanour be about Examination in the Commissioner ; the party grieved, upon oath of it, may have an Attachment against him, and cannot have a Commission to examine it upon the Certificate of the other Commissioners. Fourthly, If the Commissioners cannot agree, or any other speciall cause be ; an Examiner may be sent down of purpose to doe it. Fifthly, If the Commissioners set down the Depositions otherwise then they

they were, and the witnesses come at the hearing, and answer it; the Depositions will bee vacated, and the witnesses examined *de novo*, *Caryes Rep.* 47.80.81.30.31.40.41.43.80.81.66. 99. *Torhill* 189. *Attorneys Academy*.

As to this, these things. First, The Interrogatories to examine witnesses must bee short and apt. Secondly, When witnesses are examined in Court upon a schedule of Interrogatories, no new ones may bee put in to examine the same witnesses.

Interrogatoria.

For the point of examination, take these things. First, Witnesses may bee Examined by examiners in Court or Commissioners in the Country. Secondly, Either partie after answer put in, untill publication bee past, may examine what witnesses hee please in Court before one of the Examiners; but before answer, and after publication, no examination may bee, but by speciall order upon speciall reason; But in all cases of examination the other side must have notice of it, and of the names and dwelling places of the persons examined. Thirdly, No examination of witnesses may bee to invalid the testimonie of other witnesses, without order, and after exceptions in writing put in. Fourthly, If a single woman take out a Commission, and after marry, before examination, it seems the examination may goe on notwithstanding. Fifthly, No witness may be examined in Court after order of Publication, though hee bee sworn before, if a copie of the order of Publication were delivered to the Examiner. Sixthly, Witnesses may be twice examined, and upon better thoughts may amend their examination, if they will. Seventhly, They may bee brought again *viva voce*, at the hearing of the Cause, if the Court please. Eighthly, They may not set down their own depositions upon sight of all the Interrogatories together, but they must answer one Interrogatorie at a time, and answer that ere they hear another, nor may they goe away and answer one, and then come again and hear another: but of this see before. Ninthly, Witnesses *ad informandum conscientiam*, are never to bee taken, but upon a hearing *ubi fides dubia*. But witnesses examined after publication, not fit to bee published, may serve *ad informandum conscientiam*, upon the hearing, if the Court

Examination
of witnesss.
Sect. 42.

Witnesses.

Court think fit, *Caryes Rep.* 27.58:93. *Torbill* 189. 190. 192.

Charges.

As to witnesses, take these things. First, The parties themselves to the Suit, their Attornies, Sollicitors, or Counsellors, the wife against the husband, husband against the wife, or Guardian against the Infant, regularly are not to bee examined as witnesses, but in some speciall cases, and with speciall caution: And yet in case of misdemeanor the party himself may, and must bee examined upon Interrogatories. Secondly, No witness shall bee forced to bee examined till first hee have his costs laid down. Thirdly, If hee bee not able to travell hee shall bee excused, and must bee examined by Commission at home. Fourthly, They are in some speciall cases to bee examined before Answer; and after Publication and hearing also: Fifthly, Witnesses examined in other Courts, sometimes are alledged to bee read here at the hearing of a cause, but very seldom: Sixthly, They may, by order, bee examined again at the hearing *viva voce* for the clearing of a thing. Seventhly, But being examined in the Country, if the other side have seen the Interrogatories, they are not to bee examined here in Court. Eighthly, A witness calling himself better to mind, may amend his examination, *Caryes Rep.* 21.45.62 68.63.89. 94.95.99.100. *Torbill* 189.190:191.192.137.138.

Depositions of witnesses.

Sect. 43.

As to this, these things. First, the Depositions and Examinations of the witnesses must bee truly set down in one Roll of Parchment, subscribed with the Commissioners names; or in divers Rolls, whereof each of them is so subscribed: *See before*. Secondly, No abstract or Coppie of the Depositions of witnesses is to bee delivered before Publication. Thirdly, No Depositions of witnesses may bee suppressed upon a bare Petition only without Reference and a Certificate upon it. Fourthly, Depositions of witnesses taken in another Court, are sometimes admitted here. Fifthly, Depositions of witnesses in severall causes, which are meerly cross causes between the same parties, and touching the same matter; may bee used at the hearing of both causes (being heard together) without any motion. Sixthly, When one Party hath an order to use Depositions taken in another cause; the other partie may use the same Depositions without motion, unless it bee denied to him

by

by Speciall order of the Court. Seventhly, No motion may be to suppress Depositions of Witnesses regularly taken, till the six-clark, towards the Cause be acquainted with, and have certified the case. Eighthly, Depositions of Witnesses in this Court, may by order of the Court be used in any other Court. Ninthly, Depositions of Witnesses gotten by Practice, may, by the order of this Court, be suppressed, *Caryes Rep.* 35, 56. *Collection of Chancery orders, Tothill.*

For the illustration of all these things about Commissions and Commissioners to examine witnesses, their Examinations and Depositions, take these following cases. First, a Commission was to examine Witnesses on both parts upon fourteen daies notice to be given to the Defendant *Lucy*; one of the Defendants made Oath, That neither he nor *Varney*, another Defendant, had any notice; but if any were, it was given to *Smith*, another Defendant, little interested in the matter, and made Defendant, as he conceived, only to take away his Testimony from the other Defendants; Ordered, a new Commission be awarded to the former Commissioners, that *Lucy* shall have the carriage of it, and give the Plaintiff notice fourteen dayes, *Lucys case*, 22 *Eliz. Caryes Rep.* 91. Secondly, *Robert Medigate* was served with a *Subpœna* to testify, and did not answer certain Interrogatories ministred to him on the Plaintiffs behalf at the execution of the Commission, pretending he could not without sight of court-Rolls: And for other Interrogatories he referreth himself to former Depositions, not shewing where they are, nor when they were taken. The Court Ordered that they be considered by a Master; if he certifie it insufficient, then that he be new examined, *Wottons case*, 21 *Eliz. Caryes Rep.* 83. Thirdly, A Defendant, not being a principall Defendant, if he were examined on the Plaintiffs party in another suit between other Persons, might be used as a witness, 44 *Eliz. Caryes Rep.* 21. Fourthly, 1 *fac.* The *Ld. Chancellor Edgerton* said, that he would not help leases Paroll in Chancery, and that it were good for the Commonwealth if no Leases Paroll were allowed to be proved by witnesses, being now *testes Diabolici*, moved Fame rather than *Fama*, *Caryes Rep.* 29. First, for as much as it is informed the

tryall of the truth of the matter resteth altogether in the Declaration of the Defendant; it is therefore ordered that the Defendant shall bee examined upon Interrogatories to bee ministred by the Plaintiff, upon whose examination, if the matter fall not out of the Plaintiff, then the Plaintiff to pay the Defendant costs, and the cause to bee dismissed, *Fisfeld Plaintiff, Vinere Defendant, 2 Eliz. fol. 112.*

Secondly, The Plaintiff in the end of Easter Term, by his Attorney required the Defendant to proceed to Commission, for examination of witnesses, and the Defendant was ready to joyn; sithence which time the Plaintiff, contrary to the order of this Court (as they alledge) hath produced one of the Masters of the Court, and one of the Examiners to travell to the Plaintiffs house in *Wiltshire*, sixty miles distant from *London*, and there hath examined witnesses. It is ordered that Publication bee stayed untill the matter bee examined after Publication is granted. *Darral Plaintiff, Stuckey Defendant 19 Eliz.*

Thirdly, Upon certificate of *Veggard and West*, two Commissioners, that *Marshall* one of the Defendants witnesses, being warned by precept from them, refused to appear before them; and that *Taylor*, another witness appeared, but refused to be examined, because hee Solicites the Plaintiffs cause; It is therefore ordered that the Defendant shall examine before one of the Examiners of this Court, before the end of this Term, as well the said *Taylor*, upon any Interrogatories which shall not bee touching the secrecy of the Title, or of any other matter which hee knoweth as Solicitor only, as also the said *Marshall* or any other necessary witness, whereof the Defendant shall first set down their names, so that the Plaintiff may likewise examine them if hee will, *Ketway Plaintiff, Ketway Defendant, 22 Eliz.*

Fourthly, The Defendants were not served with Process, and yet the Plaintiff brought up divers witnesses to bee examined, but ordered they should not bee examined untill the Defendants have answered, *Episc. Salisbury Plaintiff, Hinde and Hinde Defendants, 22 Eliz.*

Fifthly, It is informed that *Colestone*, one of the Defendants examined

examined his own wife as a witness ; It is therefore Ordered the Plaintiff may take a *Subpœna* against her, on his behalf ; And if *Colestone* will not suffer her to be examined on the Plaintiffs party, then her examination on the said *Colestone* party is suppressed, *Bent* Plaintiff, *Altor* and *Coleston* Defendants, 22 *Eliz.*

Sixtly, whereas a Commission issued out to examine witnesses on both parties, which is returned executed upon Oath by *Breuer*, that he served Precepts from the Commissioners, upon *W S, T I, T C* and *I P*, to be examined on the Defendants behalf, before the said Commissioners, who appeared not : It is therefore Ordered that a new Commission be awarded to the former Commissioners at the Defendants charge, as well to examine the said four witnesses as any other, *Sheppard* Plaintiff, *Sheppard & al.* Defendants, 21 *Eliz.*

Seventhly, The Plaintiff and Defendant both joyned in Commission to examine witnesses, and the Plaintiff having the carriage of the Commission, did not execute the same but did examine witnesses here in Court ; Therefore Ordered the Defendant should have a new Commission to the former Commissioners, wherein the Plaintiff might also examine, if he list ; and at the Return thereof Publication, and in the mean time Publication is stayed, *Mackworth* Plaintiff. *Swayfield & al.* Defdts. 21 *Eliz.*

For this take these things. First, He that will have witnesses thus examined, must first exhibit a Bill and shew his Title to the thing, and that the witnesses to prove it are old and not like to live long, whereby he is in danger to lose it : and then pray a Commission to Gentlemen of credit to examine them, and a *Subpœna* to the parties interested, to shew cause, if they can, to the contrary. Secondly, If the Partie within fourteen dayes shew cause, the Plaintiff must desist, if he cannot he may goe on alone, if the other will not joyn with him, as he may if he will ; and then fourteen dayes warning for execution is to be given. Thirdly, the Court will appoint Commissioners, and give Articles to examine upon, or they may be examined in Court by an Examiner. Fourthly, If the

*In perpetuam
rei memoriam.
Scâ. 44.*

adverse party interested in the matter, can shew good matter of exception to the Commissioners against the Commissioners witnesses, or otherwise, why they should forbear, they are to forbear speeding the Commission, and certifie these things up with the Commission. Fifthly, None but aged and impotent persons may hereupon bee examined. Sixthly, The Commissioners must certifie up with the Commission, the exceptions the Defendant took to proceedings in speeding the Commission, and whether the Defendant did appear or not; and whether oath were made before them of notice given to him of the time and place of execution thereof. Seventhly, This Testimony is not to bee published while the witnesses live; but either by consent of the parties, or upon oath made, that either the Plaintiff hath some tryall wherein he shall need it, and that the witnesses are not able to come to the place, or otherwise by order of the Court, and then the Commission is to be opened by a Master and considered, and afterwards it may (if the party will) bee exemplified, and may by order of this Court; be given in evidence in any other Court. Eighthly, But these Depositions may not bee given in evidence against any other, but the Defendant who was warned to defend it, his Heirs or Assignes, or some other clayming by, or under him, by some interest which accrued to him after the Bill preferred. Ninthly, After this Publication hereof, the adverse party can examine no witness on his behalf concerning the same matter: but if the Defendant joyn in Commission and examination, then these cautions are not necessary to bee observed, *Torbill* 189. 190. 191. 192. *Collection of Orders of Chancery, West.* *Symb. Cargies Rep.* 33. 34. 35. 85. 88.

Reference.
Sect. 45.

Accompts.

Touching Reference, these things must bee known. First, No Reference may be to a Master upon a Demurrer to the Jurisdiction of the Court, but it must be heard by the Lord Keeper himself. Secondly, Nor shall any such Reference be to hear and end, to a Master or any other after examination of witnesses past, but in case of meer Kin, povertie, or consent of parties. Thirdly, A Reference of the State of the case, but by consent of parties is sparingly to bee granted. Fourthly, Accounts must be prepared by Reference, and yet not till the cause come

come to be heard, unlesse it be by consent of parties. Fifthly, The examination of the court-Rolls is to be by Reference, which must be to two Masters at the least. Sixthly, No Reference shall be made of the insufficiency of an Answer without allegation of speciall causes, *Collection of Chancery Orders.* Answer.

For a Report these things must bee known. First, the Report must not exceed the warrant of Reference. Secondly, It must be brief and with some opinion if the case bee not very doubtfull, and if so; then it must set forth the speciall case. Thirdly, No order shall be to confirm; till there be first a day given to the other side, for seven dayes at the least to speak to it in court. And yet if it be not to ground a decree, and it bee positive, it is to stand; and Proceſs may be taken out for performance thereof, unless the adverse party upon notice thereof doe, within eight dayes after, if it be in time of term, or of the generall Seals for motions, or if after within four daies of the beginning of the next term get it controled. Fourthly, If any appeal from the report of a Master, to the Court, he must first deposite forty shillings with the Register, and a day shall be set; if the Court judge it against the Appeller, the other shall have the forty shilling, and what more the Court shall judge fit; if otherwise, the money shall be restored, *Collection of Chancery Orders.* Report. Sect. 46. Costs.

When the Plaintiff and Defendant have examined what witnesses they please; then either of them may give the other a Rule for publication, which is a week; and if in that time no commission be taken out nor cause be shewed against it; then Publication is granted. Secondly, After Publication no new witnesses may bee examined but upon Oath taken, That the party that would examine hath not seene any of the examinations, or some Certificate from the Commissioners, of reasons why the witnesses could not be examined, and an Order of the Court upon it, or an Order of the Court. Thirdly, If the Suit be old, and Plaintiff and Defendant dead, there must bee a new Bill exhibited before publication can bee had, *Caryes Rep.* 66. 94. Publication. Sect. 47. Witnesses.

For Orders before the Decree and Finall Order, take this Order,

M m m 3

First.

First, An order made out of the generall Rule, must set down the speciall reasons of it. Secondly, If an order bee made and the Court not acquainted with the former Order, it is surreptitious, and not to bee used. Thirdly, No order shall bee explained by Petition, but by publique motion, both parties being heard. Fourthly, No Order but finall Orders and Decrees shall be received to bee entred after eight dayes from the day of pronouncing it, that day being excluded, *Collection of Orders in Chancery, Tohill 137. &c.*

Register.

The duty of the Register is this. First, to set down the Orders truly as the Court doth deliver them, and not by any temptation to be drawn to doe otherwise. Secondly, To mention the last Order in the present Order. Thirdly, To keep Coppies of the Orders hee doth deliver. Fourthly, After a hearing and reference to a Treaty, to set down in this Order of Reference, what was the opinion of the Court, unless it doe direct it to be drawn otherwise, *Collection of Orders of Chancery*

Day of hearing
Sect. 48.

As to this, take these things: First, After Publication had, the Complainant, or in his neglect, the Defendant may procure a day of hearing of course to bee set down by his Clerk at the end of the Term, when the Lord Keeper doth set down dayes of hearing for the next Term. Secondly, The dayes must bee set down according to their priority of Publication. Thirdly, No cause must bee presented for hearing the same Term that Publication doth pass. Fourthly, All Proceſs to hear Judgement must bee returnable six or seven dayes before the day of hearing, except it be in the beginning of the Term, when the time will not bear it: And the Writ must have on the back of it the very day of hearing. Fifthly, If the Plaintiff appear not; then the Defendant is to bee dismissed with costs, *Caryes Rep. 45. Collection of Orders of Chancery.*

The hearing it
self, Decree &
finall Order.

As to the hearing, take these things. First, if the hearing bee upon Bill and Answer, the Answer must bee admitted in all points to bee true. Secondly, The Answer must bee read in Court at the hearing, especially there where no counsell appears for the Defendant; and it appear he hath been duly served: and if in that cause the Court see cause to Decree for the Plaintiff, the reasons shall bee expressed in the Decree, and the

Costs.

Defendant

Defendant shall have a day to shew cause, so hee doe first lay down the costs set down by the Court for this delay, to the Plaintiffs Attorney, and have his certificate for it, or make oath hee tendered it. And if the Court upon the second hearing confirm the first Decree, he shall pay full costs, *Collection of Orders of Chancery.*

For Decrees, take these things. First, The Decree must be short and not recite the Pleading largely, but the sum of it briefly. Secondly If it be made before the Master of the Rolls, or before any Judges, it being drawn, must be first signed by them, and after by the Lord Keeper, and then enrolled. Thirdly, It must be signed and enrolled before the first day after the next *Michaelmas* or *Easter Term*, after the making of it. Fourthly, If it concern Land or Lease, it must within six moneths be entred into the Registers Docket-Book; otherwise it shall not prejudice the Purchasers of the Land. Fifthly, No Decree shall bind any but those who are served with Process *ad audiendum Judicium*, or did appear *gratis*. Sixthly, Nor shall it binde any that come in by conveyance, *bona fide*, from the Defendant before the Bill exhibited, and that is no partie by Bill or order. But where hee comes in *pendente lite*, and without any colour of privitie or allowance by the Court, there regularly it shall bind him. And yet if there be any intermission of the Suit, or the Court be acquainted with the conveyance, the Court is to give order in it. Sixthly, No Decree can be made, crossed, altered or explained upon a bare Petition only; and yet hereby it may be stayed for a while, till it can be moved in Court. Seventhly, Nor can it be being once enrolled, reversed, or altered, but by a Bill of Review, unless it be in case of miscasting where the case is demonstrative, which may be done by order. A Decree at this day will bind the persons: For if any doe refuse to obey it, the Court will imprison him till hee doe conform. And however it be said that a Decree cannot bind the right of the Land, yet experience teacheth that upon the matter, rights, and titles to Land and Goods, are hereby concluded also; for this Court by their order of Sequestration and Injunction, doth dispose of the possession thereof for ever, to him that it judgeth to have right

right thereunto, in conscience. Eighthly, If the Decree be to be made upon pretence of Equity against the Judgement of another Court; this Judgement is first read, and then the Decree is not to vacat the Judgement, but to order the unreasonable party. Ninthly, The course to punish the breach of, and force obedience to a Decree is, first to serve the party with it under Seal of the Court; and in case of disobedience to have all the Process of the Court of contempt out against him, one after another; and the party being taken, is to be imprisoned straitly, and not set at liberty till he obey it; that is, that he doe that which is presently to be done, and give security to doe that which is to be done *in futuro*. Also the Lord Keeper may Fine him what he please and extreat it. And if the Decree be for Land, and the party remain obdurate and willfull after his imprisonment, the Court doth use to grant an Injunction for the possession; and this being disobeyed after it is served, and Oath made thereof; the Court doth use to grant a Commission to some Justices, and if need be, a Writ of Assistance to the Sheriff to put him in possession, *Caryes Rep.* 23. 34. 36. 37. *Crompt. Jur.* 41. 43. *Collection of Chancery Orders*, *Totbill* 56. 57. &c.

Bill of Review
Sec. 49.

As to this take these things. First, When a cause is dismissed upon full hearing, and the dismissal signed and enrolled, it cannot be retained again but by a Bill of Review, and for some speciall causes. Secondly, Nor can a Decree be altered, reversed or explained but by Bill of Review, unlesse it be in case of miscasting only where the mistake is demonstrative. Thirdly, No Bill of Review is grantable but upon Error in Law appearing in the body of the Decree it self, without averment or further examination of any matter of fact, which might have been had at the time of the Decree, unlesse he shew some new matter which hath risen in time after the Decree, whereof the Plaintiff could not have advantage before, and upon Oath made that there is a discovery of such new matter, this Bill (by leave of the Court) may be exhibited. Fourthly, who so getteth this Bill, must first give security, by Recognizance to a Master, to abide the Order of the Court for costs and damages, if there shall be cause by this delay to slow it.

Fifthly,

Fifthly, Also he must first yeeld obedience to the Decree; as if the Decree be to yeeld the possession of Land, deliver Writings, pay Money, he must doe it: But if the Decree be to extinguish a Right, convey Land, release a Debt, acknowledge satisfaction, cancell Records or Evidences, or the like, it may bee stayed by the order of the Court, till the Bill of Reviver bee determined. Sixthly, And upon this Bill no witnesses shall bee examined to any matters, which were, or which might have been examined upon the former Bill; *Collection of Orders of Chancery, Tothill 173. Astorn. Acad.*

This is an interlocutorie Order in this Court, wherein these things are to bee known. First, It is sometimes before the Decree, and sometimes after the Decree, sometimes by word, as to one present in Court, or by writing. Secondly, This is sometimes to the end to get the possession of Land, and sometimes to the end to stay a Suit at the Common Law, not to goe to tryall, or if tryed, not to Judgement, or if Judged, not to execution, or if executed, that the monie bee staid in the Sheriffs hands; and this latter it will sometimes doe without laying down of any monie, and after the partie is arrested at Law for the monie. Thirdly, It is gotten commonly upon some matter of Record or writing plainly appearing, or when the Debt desired to bee stayed doth appear to bee very old and hath slept long, the Creditor and Debtor both dead a long time before the Suit brought for the Debt, or when the Defendant sits an Attachment, or departs without answering, or confesseth the Bill, or so much thereof as is sufficient: But upon privitie of Suit only, or upon surmise of the Plaintiffs Bill only, this is not grantable, especially in cases where the Defendant doth appear in time, and deny the suggestion of the Bill; And yet in cases where a Suit is for Land, or to stay a Suit at Law, and the Defendant doth not appear, but is in contempt, the Court doth usually grant this Injunction, till hee appear and satisfie his contempt. So also, in cases where the Defendant doth absent himself in a private place, or is beyond Sea, and cannot bee served with a *Subpoena*, or where hee hath gotten time to answer upon some pretence; In these cases it is usuall to grant Injunctions to stay Suits, till the Defendants

Injunction.
Sec. 50.

Where grant-
able, or not.

doe appear : And now every Commission to take an Answer, must have in it an Injunction to stay the Defendants Suit in Law, if any bee for the thing complained of by the Bill, till his Answer bee in, and the Court give order in it, if the issue bee not joyned before the Return of the *Subpoena* served upon the Defendant, and so to stay Judgement for this time ; and of this the Defendant must take notice without any serving of it. Fourthly, If the Bill come in after a Verdict at Law for the Debt, the Court will not usually grant an Injunction without laying down the monie in Court, except some speciall matter of Equitie appear in the Defendants answer, or in some former Decree : But before, though the Suit here be not begun till after the partie be arrested, yet it is not usuall to force the depositing of the monie. Fifthly, If one sue for Land here, and hanging the Suit, distrain upon it after the Answer and Replication made ; or sue here for any thing, and hanging the Suit, sue in another Court for the same thing, he may have an Injunction : But if one hath sowed corn upon Land hee hath in lease paroll, he may have it for the Corn. Sixthly, If one sue a man priviledged in this Court, in another Court, hee may stay that Suit by this means. Seventhly, Injunctions for unjust felling of Timber, ploughing up of ancient Meadow, ancient pastures not ploughed in twenty years, or to maintain inclosures kept in most of twenty years before, are grantable according to the case, but not where the Defendant doth claim any estate of inheritance in the Land, unless hee claim it in trust, or some such like speciall case, doth claim it dispensible of waste, without speciall order first given in the case. Eighthly, An Injunction to quiet a possession, is to be granted of houses and Land only, and not of a Rent or any such like thing : And there it is not to be granted before the hearing of the cause, but upon oath that the Plaintiff was in possession at the time of the Bill put in, and then only of that possession hee had then, and three years before, and at the time of the motion ; and not to be extended to the possession of those from whom hee claims, as his Tenants, &c. And this also shall not hinder the Defendants Suit in Law, making a Lease, taking of a Distress, &c. and this Injunction also, if the Plaintiff delay his Suit, is to bee dissolved

How and when
it is grantable.

dissolved again. And it was usuall to insert in this Injunction this clause ; That the Party was in possession at the time of the Bill exhibited, and certain yeers before, and that his Interest is not determined by any lawfull means, and a bond of ten pound given for the truth of this. Ninthly, If the Injunction be to stay a Suit in Law, it is used to have this clause. That it is for the same matter contained in the Bill ; and that the Suit began after the Bill put in, and a bond given that this is true. Tenthly, If it be to stay and remove a Suit by *Cercoiare*, bond must first be given that the Bill hath matter sufficient in it to bear it, and shall be proved true within fourteen daies after he hath the Writ, and this if he do not in this time; after a Certificate of his neglect from the Examiner, it shall be dismissed with costs, and a *Procedendo* granted. Eleventhly, If it be to stay a Suit after a Verdict, it must be delivered into the hands of the Lord Keeper himself, with the Order wherenpon it issued forth. Twelfthly, It is not to be granted nor revived, stayed or dissolved for stay of a Suit at Law upon a bare Petition only, without more, nor shall any Injunction of any other nature passe by Order, or Petition without notice and a copy of the Petition first given to the other side, the Petition filed with the Register & Order entred. Thirteenthly, If Councell move to have an Injunction, for matter in the Answer, he must put the case in writing to the Court, and if it fall out to be untrue, he against whom it is made shall not be punished for disobeying it, but shall have costs ; and so in all like cases, where it is gotten upon misinformation or other abuse of the court. Fourteenthly, When it is granted upon the merit of the cause, or speciall cause in Equity, it is to stand till the hearing, unlesse the Plaintiff delay his suit. Fifteenthly, It must be served, and the serving of this is much like the serving of a *Subpoena*. Sixteenthly, It is not to be dissolved upon a bare Petition only. Seventeenthly, Nor is it to be dissolved without motion of the adverse Party. Eighteenthly, And yet if an Injunction be granted till the Answer put in and Order made, and no Order be made to continue it within fourteen dayes after the Answer came in ; in this case it shall be dissolved, upon the Registers certificate thereof only ;

Costs are:

*Costs.
Procedendo.*

Costs.

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How and when
dissolved.*

and if no motion bee made that Term, or at the next general Seal after the Term, to continue it for insufficiency of, or matter confessed in the Answer, it is dissolved of course. So when it is to stay Suits at Common Law, and the Plaintiff doth not proceed for three Terms together. Nineteenthly, None will bee restrained by it, but such as are named, and therefore it must forbid Parties, Councillors, Attornies, &c. Twentiethly, The course to punish the disobedience to, and to force the obedience of, an Injunction, is thus: To serve him first with it, and in case of disobedience, and upon Oath made thereof all the Processes of contempt are to goe out against him; one after another, and being taken hee is to bee imprisoned till hee doe obey it, or give securitie to doe it; nor is hee to bee heard in the principall case till hee yield obedience in every thing. And if the Injunction bee for a possession of Land, and the partie sits all the Processe of contempt, and cannot bee found by the Sergeant at Armes, or make a Rescue; a Sequestration shall bee granted of the Land; and if hee obey it not, a Commission to put him in possession. See for all these *Toshill* 107. *Cr. Caryes Rep.* 34. 36. 40. 41. 42. 44. 45. 48. 49. 77. 80. 98. 101. 113. 47. 58. 76. 112. 113.

Sequestration.

For the further illustration of all which things, take these following cases. The Plaintiffs Husband was bound in a Statute of one hundred pounds, to pay one hundred and threescore pounds; and after by Indenture the Defendant did grant unto the Plaintiffs Husband, That if hee failed in the payment of the said one hundred and threescore pounds, the same should bee levied of certain Lands, then the said Plaintiffs Husbands Lands, called *Stirbeck*, and some other Lands specially named, lying in *Hawthorn*, in the County of *Lincoln*; the Husband dyed, and the Defendant sued execution as well of other Lands in the occupation of the Plaintiffs late Husband, as of the Lands mentioned in the Indenture: And Sir *Nicholas Bacon* Lord Keeper, granted an Injunction against the Defendant immediatly to remove from the possession of all the other Lands, except of those only contained in the Indenture; and that hee should quietly suffer the Plaintiff to enjoy the same, *Marg. Pulvertoft* Wid. Plaintiff, *Gilbert*

Pulvertoft

Pulversoft Defendant; *Anno 1. Eliz. fol. 51.* The Plaintiff served the Defendant with a *Subpoena*, to appear in Chancery, whereof hee made oath; and because the Defendant did not appear, an Injunction was awarded against the Defendant, his Councillors, and Attorneys, upon pain of two hundred pounds, nor to proceed in Judgement in an Action of Debt of fourty pounds in the Common-Pleas against the Defendant: *Knot* Plaintiff, *Jackson* Defendant, 1 *Eliz. fol. 213.* An Injunction is granted to discharge an Execution by *Elegit* taken by the Defendant out of this Court; for that hee being served with a *Subpoena* did not appear: *Hobby* Plaintiff, *Kemp* Defendant, 1 *Eliz. 274.* had been in to answer.

The Plaintiff sets forth by his Bill, That where there was a Suit depending in the Dutchy Court between the Defendant and *Christopher Asough* his brother for certain Lands; it was agreed, and the Plaintiff was bound to the Defendant in one hundred pounds, that the said *Christopher* should become bound by Obligation in the sum of one hundred pounds the tenth day of *June* following; and should then also make unto him a Release; and the Defendant was also bound by Obligation in fifty pounds to pay the said *Christopher* a sum of mony the ninth of *June* in the Parish Church of *Dale*. And because both the dayes of performance of the Conditions of the said severall Obligations were so neer together; therefore it was agreed. That when the Defendant paid his monie, the said *Christopher* should make his Bond and Release; and sheweth that the ninth day of *June* the Defendant came nor himself, but sent his servant to pay the monie, and *Christopher* was there ready to make the Bond and release to the Defendant, and offered to deliver the same to the Defendants Servants; but they refused to accept thereof, and afterward the said *Christopher* offered the same to the Defendant, but hee likewise refused to receive the same, and yet puts the Plaintiffs Bond of one hundred pounds in Suit in the Kings Bench; hereupon an Injunction is granted, with a clause (*Si in hoc*) to stay all further prosecution of any Action in any the Queens Courts at the Common Law, or elsewhere, upon the Bond of one hundred pounds against the Plaintiff, and also the taking

of any *Nisi prius*, or Judgement; or execution upon Judgement, if Judgement bee already given upon the same Bond, untill the Defendant have made a perfect answer, and the Court take other order: *Ascough* Plaintiff, *Skelton* Defendant, 2 *Elix.* 9. & 12.

The Defendants Attorney at Law was enjoined to stay his proceedings at Law against the Plaintiff in an Action of Trespass; and notwithstanding this, the Defendant himself proceeded and got Judgement, and took out a *Levari facias* against the Plaintiff; and an Injunction was granted against the Defendant himself to stay the execution of the same Writ of *Levari facias*, or if hee had executed and levied the damage and costs, that then hee should bring all the monie thereupon received into the Court of Chancery, in *Craft. Ascens. Dom.* to bee disposed of as the Court shall think fit, and yet notwithstanding himself should bee then present in Court to answer the contempt: *Sedgwick* Plaintiff, *Redman* Defendant, 2 *Elix.* 92.

The Plaintiff being son and heir to his father, who died Intestate, entred into the house whereof his father died seized in Fee, and possessed himself of certain small parcells of goods to the value of five shillings, of his fathers goods, who died Intestate: and the Defendant having an obligation of four hundred pounds made by the father unto him for performing the Covenants of an Indenture, sued the son as Executor to his father (who dyed Intestate) and upon the testimonie of some witnesses, that the Plaintiff had sold or given away the said small parcell of goods, a verdict passed for the Defendant for the whole 400*l.* which appeared by certificate of the Justices of Assizes; and thereupon an Injunction was granted to stay Judgement, and all other Actions, to bee commenced by the Defendant against the Plaintiff upon the same Obligation, untill the matter be heard or otherwise determined by the Court: *North* Plaintiff, *Kelwich* Defendant, 2 *Elix.* 237.

The Defendant exhibited his Bill into the Chancery for certain Lands, and afterwards sued the Plaintiff in the Common-Pleas for the same Lands, before the matter was determined in the Chancery; therefore an Injunction was awarded against the

the said *Body*, to stay his proceedings in the Common-Pleas, *Bill* and *Gifford* Plaintiffs, *John Body* Defendant, 2 *Eliz.* 263.

The Plaintiff made title to the Lands by a Lease-paroll, made by the Defendant unto him, whereupon hee did sow the ground with Corn, and the Defendant entred upon him; therefore the Plaintiff had an Injunction for the Corn, *Harison* Plaintiff, *Chalmley* *Myles* and *Alice* Defendants, 30 *Eliz.* for 300*l.*

The Bill was to be relieved against a Judgement, indirectly gotten, by *Ralph Cavendish*, in the name of *Thomas Cavendish* his brother, by default in an Account of waste; and because it so appeared, an Injunction is granted: *Galley* Plaintiff, *Ralph Cavendish* and *Thomas Cavendish* Defendants, 21 & 22 *Eliz.*

The Plaintiff desired to be relieved against an Obligation of a hundred pounds, which had an intricate and insensible condition put in Suit; for that the Plaintiff, being desired by the Defendant, to seal a Release, desired only time so hee advised thereof, which the Defendant would not yeeld unto, but hath put the Bond in Suit, though no waies damnified; and now the Plaintiff is ready to seal the Release; therefore an Injunction is granted: *Rowles* Plaintiff, and *Rowles* Defendant, 21, 22 *Eliz.*

The Defendant did tender an assurance to the father to be Sealed, who being old and blind, desired time to confer with his friends; the Plaintiff upon request sealed the assurance, and his father afterwards sent word to the Defendant he was willing to seal it; but the Defendant answered, hee did not pass whether hee did or no, because he had but an estate for his life, and the Defendant had his Bond to enjoy it during his life, which hee did accordingly; and yet nevertheless the Defendant put the Bond in Suit upon his fathers said refusall, but stayed by Injunction: *Knight* Plaintiff, *Harswell* Defendant, 21 *Eliz.*

The Plaintiff sought to be relieved upon an Obligation of 300 *l.* which hee entred into to make a Jointure unto his wife in consideration of 174*l.* promised to him by the Defendant in marriage, which was never paid unto him; therefore an Injunction is awarded if cause bee not shewed, *Osborn* Plaintiff, *Blavers* Defendant, 21 *Eliz.*

The

The Plaintiff sued here to be relieve for a Lease of a thousand yeers, of certain Lands, and depending the suit, the Defendant, by *quo Minus* out of the Exchequer, being Tenant of other Lands to the Queen, brought an *Ejectione firme* against the under Tenants of the Plaintiff, therefore an Injunction to stay the said suit of *Quo Minus*, if cause be not shewed; *Joanes & alii* Plaintiffs, *Miles & alii* Defendants, 21 Eliz.

Contempt.
Sect. 51.

Examination.

Witnesses.

Commitment.
Costs.

As to this, these things are to be known. First, As for contempts, in Word or Deed, upon the serving of Processess; the offender is to be committed: But in case of other contempts, by not appearance, and against Orders and Decrees, the proceeding is by Attachment, &c. Secondly, one witness is sufficient to prove it. Thirdly, when the offender comes in, he is to be examined upon Interrogatories, and these must not exceed the *Affidavit*, if they doe, he may Demur or refuse to Answer; and the Prosecutor may, if he will, have a Commission and examine against him: And hereupon it is referred sometimes to a Master to consider if it be proved; and the Contemptor may have a Commissioner present, and crosse-examine the witnesses brought by the Prosecutor: But he cannot without Order Examine other witnesses. Fourthly, The Contempt being confessed or proved, the court doth commit the Contemptor, during its pleasure, and he must pay costs, which the Master to whom it is referred must assesse. Fifthly, And if he be in contempt, as farr as to Proclamation of Rebellion, he is not to be heard in that or any other suit till the Court suspend it. Sixthly, If the Prosecutor doe not prove it, the Party prosecuted may, upon Motion, be discharged, and shall have costs against the other. Seventhly, the contempt being for not appearing, the Court may upon hearing of it (if it pleaseth) discharge the prisoner *gratis*: but if it be for disobeying an Order, he must obey the Order before he can be discharged. If upon examination it appear to be no contempt, the court will discharge it. Eighthly, It being pardoned, the Plaintiff must begin all by a new *Subpoena*. Ninthly, when a contempt is charged upon persons unable to travell, servants or workmen that live farr off, upon *Affidavit*, this may be examined by commission, at the charge of the Contemptor, the

Prosecutor

Prosecutor naming the Commissioners, one Commissioner only for contemptor present, to be executed, when and where the Six Clerks, not towards the cause, shall set down. Tenthly, The Contemptor coming in *gratis*, or by Process, may give notice to the Clerk of the other side of his appearance, and if then Interrogatories bee not put in within eight dayes, or being examined; if no Reference bee of the examination, nor Commission taken out by the other side, nor witnesses examined to prove the contempt in a moneth, the Contemptor shall bee discharged and shall have costs, which a Master may tax, and hee shall recover, and all this without any Motion. And if after hee hath appeared, hee depart not examined, hee stands committed till hee bee examined and cleared. And if it bee found, hee must clear it and pay costs ere hee bee discharged. And if hee bee cleared hee shall have no costs, because he, departed. Eleventhly, Such as come in for contempts upon Attachments or Commissions of Rebellion, must enter into bond to attend from day to day, not depart without leave of the Court, *Gwyns Rep.* 99. 44. 70. 71. 82. *Collection of Chancery Orders.*

Costs.

Commitment.

As to this thing, these things must bee known. First, This Sequestration is sometimes granted of the profits of a mans Lands or Goods, because of his wilfullness, in standing out in contempt and disobedience to the Court. And sometimes it is for discharge and payment of Debts and Duties; as when a Decree is for the payment of a Rent or sum of monie to bee paid out of Land, there a Sequestration of that Land in the Defendants hand is grantable upon the Decree: and so in divers other cases, *Tohill f.* 175. 176. Secondly, No Sequestration is to bee granted upon a bare Petition only, *Collection of Chancery Orders.*

Sequestration;
Sec. 52.

As to the point of Dismission, take these things. First, This Dismission is prayed and had upon Plea to the Bill or hearing of the Cause, and not after examination of witnesses before hearing, but upon a discontinuance of Prosecution by Motion and Order of the Court. Secondly, If the Plaintiff discontinue his prosecution after all the Defendants have answered, above the space of one Term, the Cause is to bee dismissed of course:

O o o

But

Costs,

But after a Replication put in, it cannot bee dismissed without an Order upon a Motion. Thirdly, When a cause is dismissed upon a full hearing, Recorded and certified by the Lord Keeper, it cannot bee again retained; nor a new Bill admitted but upon new matter. Fourthly, And if the Bill bee duly dismissed of course, or by order, no Motion may bee to retain it, till the costs assessed upon the dismissal bee paid and certified from the Attorney, or the other side, that it is done. Fifthly, No dismissal nor retainer upon a dismissal shall be granted upon a bare Petition only. Sixthly, In cases of dismissal not upon a full hearing to a new Bill, this may bee pleaded. Seventhly, And the Court will retain and dismiss as it doth see cause. *Collection of Chancery Orders, Charges Rep. 344, 374, 76, 110.*

Masters,

As to this, these things must bee heeded. First, Masters must not make special Reports but in speciall cases. Secondly, Their Reports must bee short and clear, and not repeat Contents, Disputes, nor former Orders. Thirdly, If any appeal from their Reports, they must deposite forty shillings; and if the Court approve the Report, the Appeller must pay it to the other, and what more costs the Court will set down. Fourthly, Masters Orders upon References to them, are to stand, and not being to ground a Decree being positive, Process may goe out of course, to force obedience, unless the other partie within eight dayes of notice get an Order to cross it. They must see that the Oaths that bee taken before them bee reverently and knowingly taken; and therefore must take them themselves, admonish the party, if they see cause, to swear what bee doth, see that hee doe read or hear it read, and subscribe his name or marke to it, in his presence: and hee is not to receive it unless it bee fairly written without blotting or interlineation of any word of substance. Fifthly, *Affidavits* for serving of *Subpoenas* are sometimes taken and certified by others as well as Masters of the Chancery. Sixthly, *Affidavits* may not be taken against *Affidavits*; and if they bee, the latter is not to bee used. Seventhly, Nor may any *Affidavits* bee taken tending to the proof or disproof of the matter in question; nor may any such bee admitted to bee solemnly inserted

About taking
of *Affidavits*.

into

into Oath made of the serving of Process. Eighthly, For the making Oath of serving *Subpoena*, see more in *Subpoena*, *Chancery* Rep. 84. 85. 99. 103. 68. 69. 81. 82. 98. and so forth.

As to this point, take this. First, Upon a bare Petition only, No Sequestration, Dismission, Recessary upon Dismissions, final Orders, are to be granted; nor Injunctions to stay a Suit in Law granted, revived, dissolved, or stayed; nor Demurrer over-ruled, former Order made in Court, nor may any former Order made in Court, be altered or explained; but such an Order may by this means be stayed for a while, till it can be moved in Court. Secondly, No commitment of any person taken upon any Process of contempt, is to be discharged by Order upon a bare Petition only, but in time of vacation, and upon hearing the adverse party, his Attorney or Clerk in Court. Thirdly, No Commission for examination of Witnesses may be awarded or discharged, or examinations suppressed upon a bare Petition only, but upon Reference to the Six clerks, not towards the cause, and their Certificate made thereupon, *Collection of Chancery Orders*.

Petition.
Sec. 53.

As to this point, know these things. First, A person may be committed and imprisoned here for these causes following (*viz.*) For putting in a fourth insufficient Answer, or for threatening a Witness to be examined at a Commission, or in the Court; Or for any misdemeanor in word or deed towards any person in serving the Process of the Court; Or for any contemptuous words against the Court, or any of the Process thereof; Or for disobeying any order of the Court. Secondly, When any Oath is made by one person alone, of the misdemeanor of any person upon serving of Process or Orders; the party upon motion is to be committed and no examination shall be made: and if two persons shall make Oath of any scandalous or contemptuous words against the Court or Process thereof; the party upon motion is to stand committed, and no examination shall be made: And if in the first case he shall not afterwards be found guilty, otherwise than by this single Oath, he shall be discharged and the Prosecutor shall have no costs against him. But if the words or Deeds be proved, he stands committed till he shall satisfy the

Commitment,
and Imprisonment.
Sec. 54.
Where it shall
be or not.

Court, and pay the Prosecutor the costs set down by the Court. And as to the other contempts against the Orders and Decrees of the Court upon *Affidavit* made; first an Attachment doth issue forth, then the partie is to be examined upon Interrogatories, then his examination is to be referred; and if hee confesses it, or it be proved against him, then hee is to be committed: And if the Prosecutor doe not follow it, or fail to prove it; the party charged shall be discharged with good costs. Thirdly, Imprisonment for matters past, may be pardoned; but if it be for not obeying an Order, this must be obeyed ere hee will be discharged, *Caryes Rep.* 41. *Collection of Chancery Orders.*

Costs.

Costs.

S. R. 55.

As to this in generall, these things are to be known. First, That costs are appointed by this Court to be paid in all these following cases: First, If the Plaintiff doe not put in his Bill by the time appointed, the Defendant must have such costs of him as a Master of the Court shall assess. Secondly, If the Plaintiff insert scandalous or criminous matter in his Bill; the party abused shall have good costs. Thirdly, If the Defendant doe not appear, but stand an Attachment; hee must pay the Plaintiff twenty shillings costs if the serving were personal, else but ten shillings, and twice so much every succeeding Process. Fourthly, If hee put in an insufficient Answer, the Defendant must for the first time, pay the Plaintiff 40.s. if it come in by Commission 50.s. the second time three pounds; the third time five pounds: and the Masters certificate upon the Reference is enough for the Plaintiff of course to have out Process for costs and a better Answer. Fifthly, If the Plaintiff except against the Defendants Answer, and it be referred and fall out to be good, the Defendant shall have forty shillings costs from the Plaintiff. Sixthly, If a Bill be dismissed for lack of prosecution, the Defendant will have costs what the Court will assess. Seventhly, If either party appeal from a Masters Report, and it goe against the Appeller; hee must pay forty shillings costs, and what more the Court shall set down. Eighthly, If a Defendant put in a Plea or Demurrer, and it be over-ruled; he shall pay the Plaintiff five marks costs: And if it be allowed, he shall have no costs. Ninth-

ly,

ly, If when a Demurrer comes to be tryed by the Court, it be dismissed upon any other cause than what was alledged in the Demurrer, yet the Defendant shall pay the five marks costs. Tenthly, If the Defendant Plead a former Bill for the same cause, and it be found against him ; he shall pay the Plaintiff five pounds costs : and if there be no Report within a moneth of filing the Plea ; the Bill is to be dismissed with seven nobles costs. Eleventhly, If a Plaintiff prosecute a contempt against a Defendant, and discontinue his prosecution, or it doth afterwards appear to be causelesse ; the Plaintiff shall pay costs as the Court shall see. So if he take out Prozesse of contempt against him, and doe not his best endeavor to execute it. So if he prosecute a contempt against a Defendant for not appearance or Answering when he comes in upon the Attachment, payes or tendereth his costs and puts in his Plea or Answer. So if when the Defendant doth Demurr or disclaim, and yet the Plaintiff doth reply, he must pay costs as the Court shall assesse. So where he gets an Injunction by an untrue suggestion. So if when a cause comes to hearing, the Court give to the Plaintiff no Relief ; then he shall pay to the Defendant such costs as the Court shall assesse. So if it passe against the Defendant, he shall pay such costs as the Court shall assesse. And if when a cause comes to hearing after examinations of witnesses, it appear to the Court, the Plaintiff might have had as full relief upon Bill and Answer, albeit he be now relieved, yet he shall not have, but pay costs, such as the Court shall assesse. Twelfthly, The Defendant was Ordered to pay costs for prosecuting a contempt after a generall pardon, *Caryes Rep.* 56. Thirteenthly, If the Plaintiff serve one man for another of the same name. If one serve witnesses to testifie, & tender no charges, nor when they come in, have no Interrogatories ready to examine them upon. If I serve another with a *Subpoena* in the name of an unknown man, and no Bill is put in by me or him. If one command another to appear in the name of the Keepers of the Liberties such a day, and he desires the sight of the Prozesse ; the server saith he must serve another with it, and leave no note, and he appear and no Bill is in ; in these cases

the party grieved shall have costs, *Caryes Rep.* 68. If one prosecute Processe of contempt, and no contempt is proved, hee may have costs, *Caryes Rep.* 82. If one prosecute another for a contempt, where none is, and the Court doth judge it so, hee shall have costs. If two Bills bee put in for one cause, the Defendant shall have one of them dismiss with costs. And if the party appointed to pay costs in these cases refuse, and bee followed and taken; for his contempt hee shall pay twice so much as his costs is before hee bee discharged. And if the party bee brought in upon any Processe of contempt, hee must pay it ere hee shall bee discharged, *Caryes Rep.* 33. 35. 36. 56. 62. 59. 57. 45. 61. 64. 69. 71. 78. 72. 74. 75. 82. 83. 97. 88. 106. 107. 109. 113. 100.

Paupers.
Sec. 56.

As to this, these things. First, The Councell and Attornies, assigned for *Paupers* may not refuse, but must attend their business, unless they shew cause to the Court why they cannot so doe. Secondly, They must have their order of admission allwaies with them, and first move that, before any other motion: And if the Register find him not a *Pauper*, hee shall not draw up any order upon the second motion, but the *Pauper* shall lose the fruit of it. Thirdly, No Councillor, Attorney or Officer of the Court, appointed to bee for a *Pauper* by the Court, is to take any thing of, or contract for any thing with him. And the *Pauper* that doth so give or contract, is to bee dispaupered for ever. Fourthly, If a *Pauper* sell or contract for his Suit or any part of it; his Bill shall be dismissed, and never after retained. Fifthly, No Processe of contempt shall goe out for him untill it bee signed by the Six Clerks who deal for him; And hee must see there bee cause for it.

FINIS.

THE

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